No. 89-1298-CSX
Status: GRANTED

Title: Ingersoll-Rand Company, Petitioner
v.
Perry McClendon

Docketed:
February 12, 1990

Court: Supreme Court of Texas

Counsel for petitioner: Nager,Glen D.

Counsel for respondent: Saunders,Michael Y., Pletcher,George E.

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Entry	Date	Note	Proceedings and Orders
1	Feb 12 1990	G	Petition for writ of certiorari filed.
2	Mar 14 1990	G	Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae filed.
3	Mar 14 1990	G	Motion of American Paper Institute, Inc. for leave to file a brief as amicus curiae filed.
4	Mar 15 1990	G	Motion of Equal Employment Advisory Council for leave to file a brief as amicus curiae filed.
5	Mar 16 1990		Brief of respondent Perry McClendon in opposition filed.
6	Mar 21 1990		DISTRIBUTED. April 13, 1990
7	Apr 16 1990		Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae GRANTED.
8	Apr 16 1990		Motion of American Paper Institute, Inc. for leave to file a brief as amicus curiae GRANTED.
9	Apr 16 1990		Motion of Equal Employment Advisory Council for leave to file a brief as amicus curiae GRANTED.
10	Apr 16 1990		Petition GRANTED.
			**********
12	May 18 1990		Order extending time to file brief of petitioner on the merits until June 14, 1990.
13	May 22 1990		Brief amicus curiae of Thomas L. Bright filed.
14	Jun 12 1990		Joint appendix filed.
15	Jun 14 1990		Brief of petitioner Ingersoll-Rand Company filed.
16	Jun 14 1990		Brief amicus curiae of Equal Employment Advisory Council filed.
17	Jun 14 1990		Brief amicus curiae of Chamber of Commerce of the U.S. filed.
18	Jun 14 1990		Brief amicus curiae of United States filed.
19	Jun 14 1990		Brief amicus curiae of Washington Legal Foundation filed.
24	Jun 25 1990		Order extending time to file brief of respondent on the merits until July 25, 1990.
29	Jun 29 1990	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
20	Jul 18 1990		Brief amici curiae of National Governors Association, et al. filed.
21	Jul 19 1990		Brief amici curiae of National Employment Lawyers Association and ACLU filed.
22	Jul 23 1990		SET FOR ARGUMENT TUESDAY, OCTOBER 9, 1990. (2ND CASE)

No. 89-1298-CSX

Entry	Date	Note	Proceedings and Orders
25	Jul 25 1990		Brief of respondent Perry McClendon filed. VIDED.
26	Aug 10 1990		CIRCULATED.
30	Aug 16 1990	D	Motion of respondent for divided argument filed.
27	Aug 21 1990	X	Reply brief of petitioner Ingersoll-Rand Company filed.
28	Aug 24 1990		Record filed.
		*	Certified original record received.
31	Aug 30 1990		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
32	Oct 1 1990		Motion of respondent for divided argument DENIED.
33	Oct 9 1990		ARGUED.

89-1298

FEB 12 1990

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY MCCLENDON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 ("ERISA") preempts a state common law claim that an employer has unlawfully discharged an employee in order to interfere with his attainment of benefits under an ERISA-covered benefit plan.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the court below were: Perry McClendon and the Ingersoll-Rand Company.*

* Ingersoll-Rand Company has an interest in the following corporate entities and partnerships: Dresser-Rand Company; Dresser-Rand Machinery; Dresser-Rand Italia; Dresser-Rand S.A.; Dresser-Rand Canada, Inc.; Dresser-Rand Compression Services S.A.; Dresser-Rand Service Personnel B.V.; Dresser-Rand Japan Ltd.; Dresser-Rand B.V.; Turbodyne S.A. de C.V.; Dresser-Rand Singapore Pte. Ltd.; Dresser-Rand de Venezuela S.A.; Dresser-Rand GmbH; Kongsberg Dresser Power, Inc.; Kongsberg Dresser Power Pte. Ltd.; KDP Commercio E. Industrial Ltd.; Kongsberg Dresser Power A/S; Dresser-Rand Holding Company; Dresser-Rand Overseas Sales Company; Dresser-Rand Sales Company, S.A.; Southwest Industries, Inc.; Turbodyne Electric Power Co.; Tepco/Pembroke Power, Inc.; Dresser-Rand U.K. Ltd.; Dresser-Rand Service S.a.r.e.; Norton/Torrington Ceramic Bearings Company; Nastach, Inc.; Ingersoll-Rand (India) Limited; and Niject Services Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ——

INGERSOLL-RAND COMPANY,
Petitioner,
v.
PERRY MCCLENDON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Ingersoll-Rand Company respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Texas (App., *infra*, at 1a-16a) is reported at 779 S.W.2d 69. The opinion of the Court of Appeals of Texas (App., *infra*, at 17a-24a) is reported at 757 S.W.2d 816. The opinion of the district court granting summary judgment for petitioner (App., *infra*, at 25a-26a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on October 18, 1989. A timely motion for rehearing was denied on November 15, 1989. App., *infra*, at 27a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 502 of ERISA, 29 U.S.C. § 1132, provides in pertinent part:

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

* * * *

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

Section 510 of ERISA, 29 U.S.C. § 1140, provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Section 514 of ERISA, 29 U.S.C. § 1144, provides in pertinent part:

> (a) Supersedure; effective date
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.
>
> * * * *
>
> (c) Definitions
>
> For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.
>
> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

STATEMENT

1. Petitioner, Ingersoll-Rand Company, hired respondent, Perry McClendon, in August 1972 as a salesperson and distributor of construction equipment. App., *infra*, at 1a-2a. At the time, petitioner provided respondent with a "Compensation Arrangement" that detailed the commissions that respondent would earn on any sales made during the course of the next year. *Id.* at 2a, 18a, 19a. Respondent also participated in petitioner's employee benefit plans, including its pension plan. *Id.* at 2a, 18a.

Respondent thereafter performed for petitioner in a generally satisfactory manner. App., *infra*, at 2a. When the market for construction equipment declined in the fall of 1982, however, petitioner terminated respondent in a reduction-in-force. *Id.* at 2a, 24a. At the time of his termination, respondent had accumulated nine years and eight months of actual service with petitioner. *Id.* at 2a, 18a. Respondent believed that, as a consequence, he was four months shy of the service credits necessary for vesting under petitioner's pension plan. *Id.* at 2a, 18a, 24a.

2. Respondent thereafter initiated suit against petitioner in state court for wrongful discharge. App., *infra*, at 2a & n.2. Respondent claimed that petitioner had breached a contract of employment and a duty of good faith and fair dealing in connection with the employment relationship. *Id.* Respondent further claimed that, even though he had actually vested in his pension benefits, petitioner had terminated him in order, among other things, to prevent him from vesting under the pension plan. *Id.* The trial court rendered summary judgment in favor of petitioner. *Id.* at 25a-26a.

3. The court of appeals affirmed. App., *infra* at 17a-24a. It initially held (*id.* at 20a-22a) that the "Compensation Agreement" in no way limited the circumstances in which petitioner could dissolve its employment relationship with respondent. It further held (*id.* at 22a-24a) that, under Texas law, no covenant of good faith and fair dealing is implied in the employment relationship. Finally, it rejected respondent's claim that he had been discharged for an illicit reason, finding (*id.* at 24a) that respondent had "incorrectly concluded that being discharged before ten years of service would prevent him from collecting certain benefits," and that petitioner "did nothing more than react to an economic downturn by reducing its sales force."

4. In a 5-4 decision, the Supreme Court of Texas reversed and remanded. App., *infra*, at 1a-16a. It declined to address respondent's claim that a duty of good faith and fair dealing should be implied into the employment relationship between petitioner and respondent. *Id.* at 2a, n.1. Instead, it held that a cause-of-action lies under Texas common law against an employer whose "principal reason" for terminating an employee is to avoid contributing to or paying benefits under the employee's pension fund. *Id.* at 1a, 5a. In reaching this conclusion, the court expressly held that Section 514 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144, did not preempt the state law cause of action recognized by the court. *Id.* at 5a n.3.

a. The majority of the Supreme Court of Texas began by noting (App., *infra*, at 3a) that, while "Texas courts have traditionally followed the employment at-will doctrine," they have placed "numerous exceptions . . . on its application." The majority explained (*id.* at 4a) that many states, including Texas, "have accepted the principle that public policy can limit an employer's power to discharge at-will employees." Specifically, it pointed out (*id.* at 4a-5a) that the United States District for the Eastern District of New York, construing New York law, "has recognized a cause of action for wrongful discharge when an employee alleges that he was terminated to deprive him of pension benefits."

The majority next found (App., *infra*, at 5a) that the State of Texas "has an interest in protecting employees' interests in pension plans." In support of this conclusion, the court cited (*id.* at 5a) both a Texas statute (Tex. Rev. Civ. Stat. Title 110B), which provides pensions for public employees, and Section 510 of ERISA, 29 U.S.C. § 1140, which makes it unlawful for an employer, among other things, to discharge an employee "for the purpose of interfering with the attainment of any right to which such participant may become entitled" under a pension plan. Indeed, the majority stated

(App., *infra*, at 5a) that "[t]he very passage of ERISA demonstrates the great significance attached to income security for retirement purposes."

The majority then concluded (App., *infra*, at 5a) that "public policy favors the protection of integrity in pension plans and requires in this case an exception to the employment at-will doctrine." Specifically, it held that (*id.* at 5a) an employee should be "allow[ed] recovery when [he] proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund." In so concluding, the majority conceded (*id.* at 5a, n.3) that there are cases holding "that a claim for wrongful discharge in order to avoid the payment of pension funds is preempted by ERISA." But the majority determined (*id.* (emphasis in original)) that these cases are distinguishable because respondent "is *not* seeking lost *pension benefits* but is instead seeking lost future wages, mental anguish and punitive damages as a result of the wrongful discharge."

b. Justice Cook, joined by Chief Justice Phillips and Justice Hecht, filed a dissenting opinion. App., *infra*, at 6a-13a. Justice Cook agreed with the majority (*id.* at 6a) that "ERISA demonstrates the great significance attached to income security for retirement." Nonetheless, he found it even more significant (*id.*) that ERISA "confers upon employees a federal version of the cause of action created by this court, confines litigation of the federal cause of action to the federal courts, and preempts the state cause of action." Specifically, he found (*id.* at 7a) that, under Section 514(a) of ERISA, "all provisions of the subchapter in which § 510 is contained preempt state laws that 'relate to' employee benefit plans," and that "[t]here can be no doubt that the law created today by [the majority] relates to a pension plan and directly conflicts with the specific provisions of § 510 establishing a federal cause of action under ERISA." Justice Cook

also objected (*id.* at 9a) to "the confusion and prolonged litigation we have thrust upon employers and employees in their efforts to resolve disputes concerning their pension plans." [1]

c. Justice Gonzalez also dissented. App., *infra*, at 13a-16a. He agreed with Justice Cook's conclusion (*id.* at 13a) that "this cause of action is preempted by ERISA." He further found (*id.* at 14a-16a) that "the federal authority that the court finds persuasive is questionable," and noted that other courts have refused to follow it.

REASONS FOR GRANTING THE PETITION

This case raises important issues concerning the application of ERISA's preemption provision to a state law that makes it unlawful for an employer to discharge an employee for the purpose of interfering with the attainment of benefits under an ERISA-covered employee benefit plan. The court below narrowly construed ERISA to preempt only state law claims for pension benefits. As other federal and state courts have recognized, however, Section 510 of ERISA regulates the employment relationship in order to preserve employee rights under ERISA-covered plans, and Section 514 of ERISA preempts state laws that attempt to do the same. Although this Court has previously addressed related issues, *see, e.g., Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987) (preemption of state common law action asserting improper processing of disability benefits claim); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (preemption of state human rights law forbidding discrimination in employee benefits on the basis of pregnancy); *Alessi v. Raybestos-*

[1] In the remainder of his dissent, Justice Cook argued (9a-13a) that the majority's decision had made summary judgment essentially unavailable in cases alleging discharge to interfere with attainment of pension benefits, and that respondent had similarly erred in asking that an implied covenant of good faith and fair dealing be implied into the employment relationship.

Manhattan, Inc., 451 U.S. 504 (1981) (preemption of state statute prohibiting offsets of workers compensation benefits against pension benefits), it has not directly addressed the precise issue presented here. The need for prompt guidance from this Court is compelling, since the state and federal courts are sharply divided over this ERISA preemption question, and since the resulting multiplicity in rules and laws regulating employers and their benefit plans is fundamentally at odds with the purpose of ERISA's expansive preemption provision—*i.e.*, to establish a single, comprehensive scheme for regulating benefit plans and employer conduct with respect thereto. Accordingly, this Court's immediate review is necessary.

I. THE DECISION BELOW CONFLICTS WITH FEDERAL AND STATE COURT DECISIONS HOLDING THAT ERISA PREEMPTS A STATE LAW CLAIM THAT AN EMPLOYER HAS WRONGFULLY DISCHARGED AN EMPLOYEE IN ORDER TO INTERFERE WITH THE ATTAINMENT OF BENEFITS UNDER AN ERISA-COVERED EMPLOYEE BENEFIT PLAN

As the majority opinion below notes (App., *infra*, at 4a-5a), the Supreme Court of Texas is not alone in holding that ERISA does not preempt a state law claim that an employer has wrongfully discharged an employee in order to interfere with the attainment of benefits under an ERISA-covered employee benefit plan. *See, e.g., Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822, 826 (E.D.N.Y. 1980); *Hovey v. Lutheran Medical Center*, 516 F. Supp. 554, 557-58 (E.D.N.Y. 1981) (relying on *Savodnik* in recognizing a state law wrongful discharge claim); *cf. KMart Corp. v. Ponsock*, 732 P.2d 1364, 1373 (Nev. 1987) (approving compensatory and punitive damages award under state law for wrongful discharge based on claim that employer discharged employee in order to avoid paying retirement benefits). These decisions, how-

ever, directly conflict with the overwhelming weight of judicial authority in the federal and state courts on this issue.

In *Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir. 1989), the First Circuit held that ERISA preempted a state law claim that an employer had wrongfully discharged an employee in order to prevent the employee's beneficiary from collecting benefits under the employer's ERISA-covered health benefits plan. The court noted (882 F.2d at 587-88) that, under Section 514(a) of the statute, "ERISA specifically preempts most state laws that 'relate to' plans covered under ERISA." The court then concluded (*id.* at 588) that, "[n]ot only does [plaintiff's] claim 'relate to' a plan covered under ERISA and thus become preempted under ERISA's preemption clause, but a specific provision of the Act creates a similar cause of action that protects an employee from wrongful interference by the employer." The court explained (*id.*) that:

> [Plaintiff's] complaint is grounded upon Codex's alleged wrongful motivation in terminating his employment: to avoid payment under an ERISA plan to [plaintiff's] former wife. This claim has much more than the requisite "connection or reference" to an ERISA plan (citation omitted). Its focus is Codex's interference with alleged benefit rights. This is precisely the type of action that section 510 sought to cover and that is essential to the Act's protection.

The Third Circuit reached an identical conclusion in *Pane v. RCA Corp.*, 868 F.2d 631 (3d Cir. 1989). In *Pane*, an employee sued his employer for compensatory and punitive damages under ERISA and New Jersey law, alleging that the employer had discriminated against him for the purpose of preventing his eligibility for severance pay and to retaliate against him for seeking severance pay. 868 F.2d at 633. The Third Circuit, however, held (*id.* at 639) that the employee's "state law

claims were properly dismissed because they are preempted by ERISA." *See also id.* at 634, 635.

Similarly, in *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987), the Ninth Circuit held that ERISA preempted a state law claim that an employer had wrongfully discharged an employee in order to prevent him from acquiring retirement benefits under its employee benefits plan. In *Sorosky*, the question on appeal concerned whether the suit had properly been removed from state court to federal court. 826 F.2d at 798-799. The Ninth Circuit held that, under this Court's decision in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), a state law claim is removable where preempted by ERISA, and that the employee's state law claim was in fact preempted by ERISA. 826 F.2d at 799. The court reasoned (*id.* at 799-800):

> The preemption issue seems clear to us . . . . In substance, Sorosky alleges that Burroughs agreed in writing to provide him with monthly retirement benefits and then sought to prevent him from acquiring those benefits. To the extent that this first claim refers to the employee benefit plan, it is preempted . . . .
>
> Sorosky's third claim, for breach of the duty of good faith and fair dealing, and his fourth claim, alleging conspiracy to interfere with a protected property interest, for the most part incorporate the allegations made in the first claim. Therefore, the third and fourth claims are preempted to the same extent as the first claim.
>
> * * * *
>
> Sorosky . . . had a federal claim under section 502(a)(3) to enforce his right under section 510 to non-interference with his employee benefits . . . . The allegations in Sorosky's complaint that relate to the employee benefit plan state a claim under, and are therefore within the scope of, section 502(a)(3)[,] even if that section does not provide the en-

> tire remedy that Sorosky seeks in his complaint. These claims are thus so completely preempted as to state a claim arising under federal law (citation omitted).

The Eighth Circuit, in *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 and 454 U.S. 1084 (1981), adopted similar reasoning in finding that ERISA preempted state law tort claims based on alleged interference with benefit rights. In *Dependahl*, three executives were terminated after a change in corporate control, and brought suit alleging tortious interference with their rights under severance pay and life insurance plans. 653 F.2d at 1210-1211. After a non-jury trial, the district court granted judgment in favor of the executives on their state law claims. *Id.* at 1211. The Eighth Circuit reversed (*id.* at 1215-1216), relying on Sections 510 and 514(a) of ERISA:

> The thrust of the former executives' argument against federal preemption of the state tortious interference with contract cause of action focuses on the lack of substantial damage such a cause of action would have on the overall purpose of ERISA. This argument, however, misses the point. If Congress has already provided a remedy for the violation of the former executives' benefit plans, then once Congress has expressed its intention to occupy the field, the state law is preempted, regardless of whether or not a conflict exists which involves a direct interference by the state law with the substantive federal legislation. Here, Congress has provided a remedy for the wrong allegedly done the former executives . . . .

The Supreme Court of West Virginia reached the same conclusion when it was confronted with this ERISA preemption question. In *Conaway v. Eastern Associated Coal Corp.*, 358 S.E.2d 423 (W. Va. 1986), a former employee sued his former employer for wrongful discharge under state law, alleging that the employer had tortiously

discharged him to prevent both the vesting of his pension rights and his eligibility for benefits under a long-term disability plan. The Supreme Court of West Virginia affirmed summary judgment for the employer, holding that such state law tort claims are "preempted by Federal ERISA law, *see* 29 U.S.C. § 1001 *et seq.* (1982), and such action is illegal under 29 U.S.C. § 1140 (1982)." 358 S.E.2d at 427.

In short, contrary to the decision below, four federal courts of appeals and one state supreme court have held, by reference to Sections 510 and 514(a) of ERISA, that federal law preempts a state law wrongful discharge claim where the employee alleges that the employer has acted for the purpose of interfering with attainment of rights under an ERISA-covered employee benefit plan.[2] Only this Court can resolve this conflict.

II. THE EXTANT JUDICIAL CONFLICT DESTROYS THE UNIFORMITY AND EXCLUSIVITY OF ERISA AND INAPPROPRIATELY BURDENS THE MAINTENANCE OF ERISA-COVERED BENEFIT PLANS

The judicial conflict on this ERISA preemption question warrants this Court's immediate review. Rule 10.1

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[2] While the Fourth, Fifth, Seventh, and Tenth Circuits have not addressed the issue, various district courts in these circuits have held, in contrast to the decision below, that ERISA preempts a state law claim that an employer wrongfully discharged an employee to prevent the vesting of pension benefits under an ERISA-covered plan. *See, e.g., Pratt v. Delta Air Lines, Inc.*, 675 F. Supp. 991, 999 (D. Md. 1987); *Rose v. Intelogic Trace, Inc.*, 652 F. Supp. 1328, 1330-31 (W.D. Tex. 1987); *Wray v. J. C. Penney Co.*, No. 85-2629-S (D. Kan. July 29, 1986) (LEXIS, Genfed library, Dist. file), at 2; *Maxfield v. Central States Health, Welfare & Pension Funds*, 559 F. Supp. 158, 160 (N.D. Ill. 1982). The decision below also conflicts with the Sixth Circuit's reasoning that ERISA preempts a state law claim that an employer has wrongfully terminated an employee in retaliation for the performance of duties under ERISA. *See Authier v. Ginsberg*, 757 F.2d 796, 800-801 (6th Cir. 1975), *cert. denied*, 474 U.S. 888 (1985).

(b) of the Rules of this Court makes clear that the presence of a conflict between a federal court of appeals and the highest court of a state counsels in favor of certiorari review. *See also Andresen v. Maryland*, 427 U.S. 463, 470 n.5 (1976); *Lakeside v. Oregon*, 435 U.S. 333, 336 & n.3 (1978). The need to resolve such a conflict is especially apt in the ERISA context, where "Congress intended to depart from its previous legislation that 'envisoned the exercise of state regulation over pension funds' and meant to establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 523 (citation omitted). Allowing the extant judicial conflict to persist will seriously undermine the concerns for uniformity and exclusivity that motivated the enactment of ERISA's preemption provision.

In 1974, Congress determined that, with exceptions not relevant to this case, the field of employee benefits, especially pension plans, should not be subject to state regulation. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 96-100, 104-106. Congress was particularly concerned with the substantial administrative burdens that conflicting or inconsistent state or local regulation would impose on such plans. *Id.* at 105 & n.25. *See also Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9-10 (1987). It was also concerned that multiple rules and regulations would discourage employers from providing employee benefits. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 105 n.25; *see also Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 10. Accordingly, it enacted ERISA's "virtually unique pre-emption provision" to ensure that all regulation of the field of employee benefits would be a matter of exclusive federal concern. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983); *see also Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. at 46.

Permitting the above-referenced judicial conflict to persist would disrupt this exclusive federal scheme. Individual states would be free to prescribe different substantive standards for employer conduct, so that conduct by the employer that was lawful under Section 510 of ERISA might simultaneously be unlawful under the law of the particular state where the affected employees worked or resided—resulting in the very patchwork quilt of inconsistent regulation that Congress sought to avoid through ERISA's preemption provision.[3] Likewise, some states would be free to prescribe their own procedural frameworks for the enforcement of these rights, even though ERISA establishes a uniform federal enforcement scheme, *see* 29 U.S.C. § 1132; thus, exhaustion of internal claims and appeal procedures and the manner of trial (by judge or jury) could vary from the rules adopted by the federal courts. *Compare Dale v. Chicago Tribune Co.*, 797 F.2d 458, 466 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987) (requiring exhaustion of internal claim and appeal procedures in ERISA cases), and *Pane v. RCA Corp.*, 868 F.2d 631, 635-637 (3d Cir. 1989) (trial by judge in ERISA cases), *with KMart Corp v. Ponsock*, 732 P.2d 1364 (Nev. 1987) (jury trial without any exhaustion efforts). Finally, states would be free to prescribe their own array of remedies for violations of these

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[3] Under the decision below, for example, the employer's decision is unlawful if "the principal reason" for it is the employer's "desire to avoid" paying benefits. App., *infra*, at 5a. It is unclear what this formulation will come to mean in the Texas state courts and, more importantly, how that standard compares to the federal case law standard. *See Gavalik v. Continental Can Co.*, 812 F.2d 834, 851-853 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987); *Nixon v. Celotex Corp.*, 693 F. Supp. 547, 555 (W.D. Mich. 1988); *Nemeth v. Clark Equipment Co.*, 677 F. Supp. 899, 906 (W.D. Mich. 1987). Moreover, under the decision below (*see* App., *infra*, at 5a), an employer's desire to avoid *contributing to* the pension fund would be a violation of Texas law, even if the employer's purpose was not to interfere with the attainment of benefits—a gross variance from the substantive requirements of ERISA Section 510 and a clear invasion of the separate funding requirements of ERISA.

rights, even though ERISA's comprehensive remedial scheme for Section 510 violations might not allow one or more of those remedies (such as punitive damages). *Compare Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987) (no punitive damages under ERISA), *with KMart Corp. v. Ponsock*, *supra* (compensatory and punitive damages awarded).

The multiplicity and inconsistency of such regulation would impose on employers and their benefit plans precisely the burdens that Congress intended for ERISA's broad preemption provision to avoid. Contrary to congressional intent, it would tend to discourage the establishment and maintenance of employee benefit plans. Employer conduct, such as termination of an employee's employment, otherwise unquestionable in the absence of an employee benefit plan would instantly become subject to suspicion and challenge under state law if the employer's action interfered with the attainment of an employee's benefits under an employee benefit plan. Moreover, state regulation of such employer conduct would impose a financial burden on the plans themselves. An employer with an employee benefit plan, knowing that its employment decisions would be subject to suspicion and challenge under state law, would tend to modify its conduct —for example, refrain from discharging an employee merely because a person is close to vesting in a pension— so that more employees would get greater employee benefits than they would otherwise have received. Finally, state regulation of such employer conduct would impair the ability of an employer effectively and efficiently to manage its business, imposing costs on the production process that Congress intended to avoid in ERISA.

It is true, of course, that Section 510 itself imposes some of these burdens on employers and their plans. But, in enacting Section 510, Congress carefully fashioned the substantive rights, the procedures, and the available remedies so that the burdens thereby created would be tolerable when balanced against the protections afforded

employees. *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. at 52-57. The same cannot be said for whatever variant of Section 510 a state might choose to impose. A state cause-of-action imposing a different substantive standard of conduct, with a different burden of proof, as well as jury trials and punitive damages, obviously would increase the burdens on employers and their plans. It would, as Justice Cook noted in dissent below (App., *infra*, at 9a), merely produce "confusion and prolonged litigation between employers and employees in their efforts to resolve disputes concerning pension plans"; indeed, variant state causes-of-action would create intolerable confusion, cost, and uncertainty in the administration benefit programs and the resolution of claims. Thus, this Court's immediate review is necessary to resolve the judicial conflict and eliminate these adverse consequences.

III. THE COURT BELOW ERRED IN CONCLUDING THAT ERISA DOES NOT PREEMPT A STATE COMMON LAW CLAIM THAT AN EMPLOYEE HAS BEEN WRONGFULLY DISCHARGED TO PREVENT HIS VESTING IN PENSION BENEFITS

On the merits, the court below plainly erred in its construction of ERISA's preemptive scope. ERISA preempts a state common law claim that an employer has unlawfully discharged an employee in order to prevent him from vesting in pension benefits.

A. A State Law Claim That An Employer Has Interfered With The Attainment Of An Employee's Benefits "Relates To" An Employee Benefit Plan And Is Therefore Preempted

ERISA's pre-emption provision is "deliberately expansive." *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. at 46. As noted above, it aims to make "pension plan regulation . . . exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 523. Thus, by the terms of Section 514(a), "the provisions of [ERISA] . . . supersede any and all State laws insofar as they

may now or hereafter relate to any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a).

A state law that bars an employer from discharging an employee in order to prevent his vesting in pension benefits plainly "relate[s] to" an employee benefit plan within the meaning of Section 514(a). As this Court has repeatedly stated, a "law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 96-97. *See also Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) (citation omitted). A claim of discharge to prevent vesting in a pension plan clearly has such a "connection" and "reference": The claim requires proof that the employer's actual purpose in terminating the employee revolved around an employee benefit plan, and, as the Supreme Court of Texas noted (App., *infra*, at 5a), is expressly designed to "protect[] employees' interests in pension plans." Indeed, litigation of the claim would, in many instances, require examination of the terms of the plan in order to understand how the employer's action interfered with the attainment of a benefit under it.

That such a state law claim "relates to" a benefit plan within the meaning of Section 514(a) is confirmed by the remaining language of the preemption provision. This language makes it plain that it is the "provisions of this subchapter"—*i.e.*, the subchapter in which Section 514(a) appears—that preempt state laws relating to benefit plans. 29 U.S.C. Section 1144(a). Section 510 of ERISA is one of the provisions of that subchapter. By so incorporating Section 510 into the terms of Section 514(a), Congress made it clear that claims concerning "interference" with the attainment of benefits "relate to" the employee benefit plan. *Accord, Fitzgerald v. Codex Corp.*, 882 F.2d at 588.

B. The Decision Below Errs In Holding That ERISA's Preemption Provision Applies Only To Claims For Benefits, And Not To Claims For Wrongful Discharge

In reaching the contrary conclusion, the Supreme Court of Texas held (App., *infra*, at 5a n.3) that ERISA's preemption provision applies only to claims for benefits, and not to claims for wrongful discharge. It reasoned (*id.* (emphasis added in original)) that respondent "is *not* seeking lost *pension benefits* but is instead seeking lost future wages, mental anguish and punitive damages as a result of wrongful discharge." This reasoning is fallacious.

ERISA does not preempt only state law-based actions seeking benefits. It preempts any state law that "relates to" an employee benefit plan. As this Court's decisions evidence, a state law may "relate to" an employee benefit plan even though it seeks damages other than lost benefits. *See, e.g., Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987) (preemption of state common law action seeking punitive damages for improper processing of a disability benefits claim).

Moreover, a state law claim may "relate to" an employee benefit plan, and thus be preempted by ERISA, even though it is intended to regulate the terms of the employment relationship (and not the terms of the benefit plan itself). Just like Section 510 of ERISA, the state law claim would seek indirectly to protect employee benefit rights by directly regulating the employment relationship—*i.e.*, by prohibiting employment decisions that might otherwise defeat employee benefit rights under the plan. In other words, the state law claim would have the same substantive objective and effect as Section 510 of ERISA, and Section 510 is one of the critical substantive

components of ERISA that were supposed to preempt the field of employee benefits.[4]

Indeed, the fact that respondent is seeking state law remedies for what is essentially a Section 510 claim only reinforces the conclusion that the claim allowed by the court below must be preempted. Section 510 provides that its terms are to be enforced under the provisions of Section 502 of ERISA. *See* 29 U.S.C. § 1140. Section 502 sets forth a comprehensive enforcement scheme for actions covered by ERISA, and this Court has held that "varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress." *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. at 52. Thus, any attempt by the State of Texas to add to the remedies available under Section 502 for a claim relating to an interference with

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[4] The legislative history of ERISA confirms this conclusion. As this Court has noted, "[t]he bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 98. "The Conference Committee rejected these provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language." *Id.* at 98. There is no basis in the legislative history for suggesting that, in so expanding the scope of the preemption clause, the Conference Committee intended to allow state regulation of specific subjects covered by ERISA—such as Section 510's coverage of actions that might "interfere" with the attainment of benefits under the plan. *Cf. United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977) (finding that the exemption for "involuntary retirement" in original Age Discrimination in Employment Act bill was implicitly embodied in subsequent amendment's broader exemption for "bona fide employee benefit plans"). On the contrary, the legislative history indicates that Congress viewed Section 510 as a critical substantive component of ERISA's protective scheme and, furthermore, that, with the narrow exceptions specified in the bill, the substantive and enforcement provisions of that scheme were intended to preempt the field of regulation. *See* 3 ERISA Legislative History 4597-98; *see also id.* at 4670 (remarks of Rep. Dent); *id.* at 4745-46 (remarks of Sen. Williams); *id.* at 4770-71 (remarks of Sen. Javits).

attainment of benefits—like a claim under Section 510—must be preempted. As the Court stated in *Pilot Life*, "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." 481 U.S. at 54.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 1990

APPENDIX

APPENDIX

SUPREME COURT OF TEXAS

No. C-7973

PERRY MCCLENDON,
Petitioner,
v.

INGERSOLL-RAND COMPANY, d/b/a INGERSOLL-RAND COMPANY CONSTRUCTION EQUIPMENT GROUP,
Respondent.

Oct. 18, 1989

Rehearing Denied Nov. 15, 1989

Michael Y. Saunders, John W. Tavormina, Houston, for petitioner.

William T. Little, Houston, for respondent.

SPEARS, Justice.

This is a suit for wrongful discharge. Perry McClendon sued his former employer, Ingersoll-Rand Company. McClendon alleged that he was discharged from his employment so that Ingersoll-Rand could escape its obligation to contribute to his pension fund. The trial court rendered summary judgment in favor of Ingersoll-Rand. The court of appeals affirmed. 757 S.W.2d 816 (1988). We reverse the judgment of the court of appeals and remand the cause to the trial court.

In August 1972, McClendon began employment with Ingersoll-Rand as a sales-person and distributor of con-

struction equipment. He was paid on a commission basis in accordance with the terms of a "Compensation Arrangement" that was to remain in effect through December 1982; however, this "compensation arrangement" did not specifically dictate the term of McClendon's employment.

In late 1979, Ingersoll-Rand transferred McClendon from San Antonio to Dallas so that he could develop a potentially lucrative market there. McClendon secured a substantial amount of business in Dallas, and McClendon's supervisor later testified that he was satisfied with McClendon's job performance. Nevertheless, Ingersoll-Rand fired McClendon on November 19, 1982. Ingersoll-Rand justified McClendon's termination by claiming that external economic factors mandated a work force reduction of *one* salesperson.

McClendon's termination from employment occurred after he had accumulated nine years and eight months of service to Ingersoll-Rand. Further, the termination occurred exactly four months prior to the vesting of McClendon's retirement and pension benefits, at which time Ingersoll-Rand would have been required to contribute to McClendon's pension fund.

In filing suit, McClendon alleged that Ingersoll-Rand breached its employment contract with him and breached its duty of good faith and fair dealing in connection with the employment relationship.[1] In addition, McClendon asserted a cause of action for wrongful discharge and alleged that Ingersoll-Rand had terminated him to escape its obligation to contribute to his pension fund[2] and to avoid paying him the commission from a particular sale.

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[1] Because we have decided this cause on other grounds, we need not reach the issues relating to the tort duty of good faith and fair dealing and we express no view on this matter.

[2] Although Ingersoll-Rand ultimately allowed McClendon's pension to vest, McClendon argues that such subsequent vesting does not retroactively reverse any bad faith conduct in which Ingersoll-Rand engaged when it terminated McClendon to avoid pension contributions. McClendon argues that the pension plan issue is relevant in order to explain the motivation behind Ingersoll-Rand's initial termination of McClendon.

At issue is whether McClendon's allegations state a cause of action under Texas law. Texas courts have traditionally followed the employment-at-will doctrine which allows that employment for an indefinite term may be ended at will and without cause. *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 10 S.W. 99 (1888); *Molder v. Southwestern Bell Tel. Co.*, 665 S.W.2d 175 (Tex.App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

Although this doctrine has been widely accepted, numerous exceptions and limitations have been placed on its application. For example, federal law prohibits the discharge of an employee because of age, race, religion, sex, color or national origin. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d) (1982 & Supp. 1985); Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1977). Federal law also prohibits a private employer from discharging an employee who exercises his rights under the Fair Labor Standards Act to minimum wage and overtime. 29 U.S.C. § 215(a)(3) (1977 & Supp.1982). Similarly, Texas has enacted various statutes that restrict an employer's discretion to terminate the employment relationship. *See, e.g.*, TEX.REV. CIV.STAT. art. 5207a (discharge based on union membership); TEX.CIV.PRAC. & REM.CODE § 122.001 (discharge because of jury service); TEX.REV.CIV.STAT. art. 8307c (discharge for filing a worker's compensation claim); TEX.GOV'T CODE § 431.006 (discharge because of active duty in the state military forces); TEX.REV.CIV.STAT. art. 5221k, § 5.01 (discharge based on race, color, handicap, religion, sex, national origin or age).

In addition to state and federal legislation, courts have developed various common-law restraints on the doctrine of employment-at-will. In *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex.1985), this court recognized a cause of action for a plaintiff alleging that he was discharged for refusing to perform an illegal act. In creating this exception to the employment-at-will doctrine, we considered the changes in American society and in the employer/employee relationship over the course of the past century, and we held that public policy, as expressed in both state and federal law, required such an exception. *See also Petermann v. International Brotherhood of Teamsters, Local 396*, 174 Cal. App.2d 184, 344 P.2d 25 (1959) (recognizing public policy exception to employment-at-will doctrine in case of employee alleging that he was wrongfully discharged for refusing to perjure himself before a legislative investigative committee).

Numerous other states have accepted the principle that public policy can limit an employer's power to discharge at-will employees. *See Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353 (1978); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Harless v. First Nat'l Bank*, 162 W.Va. 116, 246 S.E.2d 270 (1978). More specifically, the Eastern District of New York has recognized a cause of action for wrongful discharge when an employee alleges that he was terminated to deprive him of pension benefits. *Hovey v. Lutheran Medical Center*, 516 F.Supp. 554 (E.D.N.Y.1981). The court expressly recognized the public policy associated with the preservation of pension plans for both governmental and private employees. *Id.* at 558; *see also Savodnik v. Korvettes, Inc.*, 488 F.Supp. 822, 826 (E.D.N.Y. 1980) (recognizing strong public policy "favoring the protection of integrity in pension plans" and allowing

wrongful discharge cause of action for plaintiff who alleged that employer fired him to avoid paying pension benefits).

In determining whether McClendon has stated a cause of action under Texas law, we recognize that the state has an interest in protecting employees' interests in pension plans. *Cf.* TEX.REV.CIV.STAT., Title 110B (Vernon 1988) (reflecting state's interest in preserving pension plans for public employees). Also, the Employee Retirement Income Security Act (ERISA) makes it unlawful for any person to discharge, fine, suspend or discriminate against any employee for the purpose of interfering with that employee's potential rights under a pension plan. 29 U.S.C. § 1140. The very passage of ERISA demonstrates the great significance attached to income security for retirement purposes.

We hold that public policy favors the protection of integrity in pension plans and requires in this case an exception to the employment-at-will doctrine. This exception allows recovery when the plaintiff proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund.[3]

We reverse the judgment of the court of appeals and remand this cause to the trial court for trial.

COOK, J., files a dissenting opinion in which PHILLIPS, C.J., and HECHT, J., join.

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[3] Two federal district court cases have held that a claim for wrongful discharge in order to avoid the payment of pension funds is preempted by ERISA. *Pratt v. Delta Air Lines, Inc.*, 675 F.Supp. 991 (D.Md.1987); *Cahall v. Westinghouse Electric Corp.*, 644 F.Supp. 806 (E.D.Penn.1986). These cases, however, can be distinguished from the present action because here the plaintiff acknowledged in his brief to the court of appeals that he is *not* seeking lost *pension benefits* but is instead seeking future wages, mental anguish and punitive damages as a result of the wrongful discharge.

GONZALEZ, J., files a dissenting opinion.

COOK, Justice, dissenting.

I dissent. The central issue in this case, as argued and briefed by the parties, concerns whether the duty or implied covenant of good faith and fair dealing exists in the context of an employment-at-will relationship. The majority opinion not only fails to address this issue, but also creates a state cause of action based on conduct already prohibited by federal statute. Given the adverse impact that the majority opinion will have upon our court systems, I would affirm the judgment of the court of appeals.

I. ERISA

The court reminds us that § 510 of the Employee Retirement Income Security Act (ERISA) makes it unlawful for any person to interfere intentionally with impending pension eligibility. 29 U.S.C. § 1140 (1985). According to the court, ERISA demonstrates the great significance attached to income security for retirement.

I agree. ERISA's § 510 is indeed significant, so significant that it confers upon employees a federal version of the cause of action created by this court, confines litigation of the federal cause of action to the federal courts, and preempts the state cause of action.

Section 510 of ERISA expressly states that it is "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan." *Id.* The case law has interpreted § 510 to delineate a cause of action that applies in precisely the same situations as the one considered today. *See, e.g., Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987).

Congress provided for the enforcement of § 510 in § 502, which comprises the statute's civil enforcement provisions. 29 U.S.C. at § 1132. Section 502(e)(1) confines litigation of certain claims to federal court. *Id.* at § 1132(a)(3). One of those claims is the § 510 action. *Id.*; 29 U.S.C. at § 1140. Consequently, an ERISA claimant who sues for termination resulting from intent to avoid pension responsibility may sue only in federal court.

The provisions of § 510 do not initially appear to affect the law set out today. It is, after all, possible for state and federal law to address the same problem. Section 514 of ERISA, however, makes it clear that duplication of effort in this area of the law is simply not allowed. 29 U.S.C. at § 1144. Under § 514(a) all provisions of the subchapter in which § 510 is contained preempt state laws that "relate to" employee benefit plans. *Id.* at § 1144(a). In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 57, 107 S.Ct. 1549, 1558, 95 L.Ed.2d 39 (1987), the United States Supreme Court decided that § 514 superseded a state common law that related to an employee benefit plan. The powerful effect of § 514(a) was repeatedly emphasized by the Court, which expressed its unanimous conviction that Congress intended to establish pension plan regulation as an exclusively federal concern. *Id.* at 45-47, 52-56, 107 S.Ct. at 1551-53, 1555-57.

There can be no doubt that the law created today by this court relates to a pension plan and directly conflicts with the specific provisions of § 510 establishing a federal cause of action under ERISA. Consequently, that section preempts our new law through § 514(a). *See Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987). Furthermore, because preemption of the claim at issue leaves a plaintiff with a cause of action that can be litigated only in federal court, ERISA preempts the forum as well as cause of action. Arguably, this simul-

taneous affect on forum and claim may deprive the state court of the power to adjudicate. *See International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986).

Notwithstanding the power of this set of ERISA provisions, a plaintiff might still rely on our decision today to bring our version of the claim for pension-related wrongful discharge in a state court. The plaintiff could purge ERISA from the face of the petition and rely on the well-pleaded complaint rule to deter removal of the case to federal court. *See Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). Under that rule, which states that a petition that describes only state claims on its face prevents removal by a defendant to federal court, a defendant would be left with nothing better than the dubious opportunity to convince a state court that the pertinent ERISA provisions deprive the state court of subject matter jurisdiction.

This procedural block to removal, however, no longer deters the ERISA § 502(a) defendant. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 67, 107 S.Ct. 1542, 1548, 95 L.Ed.2d 55 (1987), the United States Supreme Court created an exception to the well-pleaded complaint rule in deciding that these defendants may remove. Furthermore, the fact that a state court has no jurisdiction over the claim to begin with, which once prohibited removal, restrains defendants no longer. 28 U.S.C. § 1441 (e) (Supp.1989). It is clear, therefore, that defendants faced with a petition that states no more than our new cause of action may remove to federal court, raise the defense of preemption, and replace the common law claim.

By creating today's exception to the employment at will doctrine, the court misleads employees by providing them with an imaginary claim. ERISA, on the other hand, provides them with a real and enforceable claim that they may bring in federal court and at the same

time supersedes the claim manufactured today. I believe that ERISA's provisions make it doubtful that a state court even has power to adjudicate the new cause of action. In any case, astute defendants need not wait to find out. They need only remove to federal court and raise a defense of preemption. I sincerely regret the confusion and prolonged litigation we have thrust upon employers and employees in their efforts to resolve disputes concerning their pension plans.

II. SUMMARY JUDGMENT

An equally profound implication of the majority opinion concerns the availability of summary judgment proceedings in wrongful discharge cases. In its motion for summary judgment, the general supervisor for Ingersoll-Rand submitted a sworn affidavit stating that McClendon's termination arose as part of a company-wide reduction of the workforce in response to adverse economic conditions. The response by McClendon noted that his termination occurred four months prior to the vesting of his pension, at which time the company would have been required to contribute $3000 to his employee pension fund. McClendon also relied on comments made by his supervisor, who stated his general satisfaction with McClendon's job performance. This evidence, according to the holding of the majority, is sufficient to raise a fact issue on whether the employer terminated the employee in part to escape contributions to the employee pension fund.

This holding, however, raises a question that remains unanswered: when will the evidence presented on motion for summary judgment be insufficient to raise an issue of fact on the employer's intent? The court today finds a fact question under the evidence presented in this case, a case in which the termination preceded the vesting of the benefits by four months; would a fact question also be raised when the termination preceded the vesting by

five months or nine years and eleven months? The majority opinion unfortunately fails to provide trial courts and litigants with the answer to this crucial question. In the absence of an answer, an employee is presumably guaranteed a jury trial by merely alleging that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund.

This approach undercuts the very purpose of summary judgment proceedings, which are designed to eliminate patently unmeritorious claims and untenable defenses. *See In re Estate of Price*, 375 S.W.2d 900, 904 (Tex. 1964). The provision for summary judgment proceedings serves the critical functions of eliminating baseless claims from congested trial dockets and saving the unwarranted expenses involved in trying such actions. This concern has likewise been recognized in the context of wrongful discharge actions brought pursuant to ERISA. For example, an employee must establish more than the mere fact that the termination of his employment resulted in a monetary savings to his employer; otherwise, an ERISA violation would occur every time an employer terminated a vested employee. *See Nixon v. Celotex Corp.*, 693 F.Supp. 547, 555 (W.D.Mich.1988); *Donohue v. Custom Management Corp.*, 634 F.Supp. 1190, 1197 (W.D.Pa. 1986).

Herein lies the crux of my concern with the majority opinion. By permitting tort damages in actions based on the employer's desire to escape an obligation to contribute to pension funds and yet failing to deliniate those circumstances under which a summary judgment would be appropriate, the court has unduly chilled an employer's right to terminate an at-will employee with or without cause. No longer can the vast number of employers rely on a valid reason in terminating employees without a jury's scrutinization of their decisions and the possible imposition of tort damages. By terminating employees

at any point prior to their retirement, employers need only wait for the court summons to explain and justify their decisions to a jury. The proverbial "floodgates of litigation" have never been a more appropriate concern than in the decision reached by this court today. For this reason, I strongly oppose the majority's decision to place unwarranted limitations on the employment-at-will doctrine.

III. BREACH OF GOOD FAITH AND FAIR DEALING

In his arguments presented to this court, McClendon seeks to hold Ingersoll-Rand to the duty of good faith and fair dealing in the context of their former employment relationship. Despite his characterization of this duty as an "implied covenant," which suggests an action sounding in contract, McClendon also seeks the recovery of tort damages such as mental anguish, emotional distress, and punitive damages. McClendon based his claim for tort damages on *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex.1987), a case in which this court recognized a duty on the part of insurers to deal fairly and in good faith with their insureds. This duty arises from the special relationship that exists in the insurance context due to an unequal bargaining power between the parties and the special nature of such contracts. *Arnold*, 725 S.W.2d at 167. While implied covenants are contractual in nature, the duty of good faith and fair dealing is imposed by law in insurance relationships. *Chitsey v. National Lloyds Ins. Co.*, 738 S.W.2d 641, 643 n. 1 (Tex.1987).

Employers, however, do not generally receive economic benefits by terminating productive employees and thus do not require disincentives to terminate employees in addition to those already imposed by law. *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 765 P.2d 373, 396, 254 Cal.Rptr. 211, 234 (1988); Epstein, *In Defense of*

the Contract at Will, 51 U.CHI.REV. 947, 973-74 (1984) (hereinafter Epstein, *Contract at Will*). Further, employment relationships do not possess an inequality in bargaining power as a universal characteristic and thus cannot be analogized to insurance relationships on this basis. *See* Epstein, *Contract at Will*, 51 U.CHI.L.REV. at 973-74; *see also* Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN.L.REV. 153, 165-67 (1981) (hereinafter Note, *Defining Torts*).

The employment relationship is also distinguishable on the basis of the duties owed by the respective parties under the contract. Employers, unlike insurers, do not owe similar fiduciary duties to their employees, who are themselves agents of the employers and are obligated to act in their employers' interests. *Foley*, 765 P.2d at 395, 254 Cal.Rptr. at 233, (citing Note, *Defining Torts*, 34 STAN.L.REV. at 165-67). The duties owed in an employment-at-will relationship are instead premised on the mutuality of obligations existing between the employee and employer, both of whom are able to terminate the relationship with or without cause. I would therefore decline to extend the duty articulated in *Arnold* and its imposition of tort damages to employment-at-will relationships. There should not be a tort cause of action for a breach of good faith and fair dealing in an employment-at-will relationship. I would thus follow the majority of jurisdictions that have not allowed the recovery of tort damages for a breach of the duty or implied covenant of good faith and fair dealing in at-will employment relationships.

Additionally, McClendon is not entitled to recover contract damages under an implied covenant of good faith and fair dealing in this case. According to McClendon, the company terminated his employment to avoid paying any commissions that he would have earned from future sales. The contractual right to these commissions was set forth in a written compensation agreement, which

expressly addressed the commissions to be earned by McClendon in the event that Ingersoll-Rand terminated his employment for any reason. McClendon has not alleged that the company owed any commissions that had already been earned under the terms of this agreement at the time of his termination. Instead, McClendon apparently seeks the recovery of commissions that would have eventually been earned from future sales.

McClendon and Ingersoll-Rand contemplated and expressly set forth the manner by which the commissions would have been earned in the event of a termination. Under the express terms of this agreement, the parties did not create a right on behalf of McClendon to earn potential commissions. Thus, the covenant of good faith and fair dealing cannot be implied in this instance to set aside the express terms of their agreement and permit McClendon's recovery of potential commissions. *See Willis v. Champlain Cable Corp.*, 109 Wash.2d 747, 759, 748 P.2d 621, 627 (1988).

McClendon further alleges that Ingersoll-Rand terminated his employment in order to prevent the vesting of his retirement and pension benefits, thereby relieving the company of its required contribution to his pension fund. On motion for summary judgment, however, Ingersoll-Rand presented an uncontroverted affidavit stating that McClendon's benefits have in fact vested. Because McClendon has received his retirement and pension benefits, the trial court properly rendered summary judgment with respect to the recovery of these contractual benefits.

I would accordingly affirm the judgment of the court of appeals.

PHILLIPS, C.J., and HECHT, J., joint in this dissent.

GONZALEZ, Justice, dissenting.

I join with Justice Cook's conclusions that this cause of action is preempted by ERISA, and that it will be

very difficult, if not impossible, to filter out meritless cases by summary judgment as a result of today's opinion. I write, however, to emphasize what the court's decision does not do. It does not extend the duty of good faith and fair dealing to the employment-at-will doctrine; and it does not decide what damages are available for this new cause of action. I further note that the federal authority that the court finds persuasive is questionable.

By point of error, McClendon invited us to engraft the duty of good faith and fair dealing as enunciated in *Arnold v. National County Mutual Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex.1987) on to the employment-at-will doctrine.[1] We refused.

In responding to this point of error, the court instead created a narrow "exception to the employment-at-will doctrine." In creating this exception, the court fails to give the bench and bar clear guidance as to whether this "exception" creates a new cause of action sounding in tort or whether it merely eliminates the doctrine as a contractual defense. *See Brockmeyer v. Dun & Bradstreet*, 113 Wis.2d 561, 335 N.W.2d 834 (1983); *see generally*, Annotation, *Discharge of At-Will Employee*, 12 A.L.R. 4th 544 (1982).

In an attempt to avoid the preemptive effect of ERISA, the court observes that the plaintiff here is "seeking lost future wages, mental anguish and punitive damages" as a result of the alleged wrongful discharge. P. 71 at n. 3. The court, however, does not resolve whether the plaintiff is entitled to all damages pleaded. This is essentially an open question. In *Azar Nut Co. v. Caille*, 734 S.W.2d 667 (Tex.1987), we allowed punitive damages, but this was

[1] We granted McClendon's application for writ of error on points two and four. Point four contended: "The Court of Appeals erred when it failed to recognize that a covenant of good faith and fair dealing should be applied to Respondent's employment relationship with Petitioner."

in a statutorily-created cause of action for which the right to exemplary damages could reasonably be inferred from the language of the statute. In *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex.1985), we recognized a common law exception but did not decide the question of available damages. *Id.* at 736 (Kilgarlin, J., concurring). As a general rule, the damages available for common law wrongful termination are contractual in nature. *Greater Fort Worth and Tarrant County Community Action Agency v. Mims*, 627 S.W.2d 149 (Tex.1982).

Furthermore, the court's reliance upon two federal district court cases, *Hovey v. Lutheran Medical Center*, 516 F.Supp. 554 (E.D.N.Y.1981) and *Savodnik v. Korvettes, Inc.*, 488 F.Supp. 822 (E.D.N.Y.1980) is misplaced. Those two courts created a public policy exception to the employment-at-will doctrine that another New York federal district court refused to follow, stating:

> [A] change in New York's law such as the recognition of a tort which for the last 90 years has not been recognized by the New York Court of Appeals, should not be brought about by a federal district court deciding issues of state law solely by virtue of the diversity of citizenship of the parties before it (citations omitted). [H]irings for an unspecified or indefinite period are freely terminable at the will of either party.

Salanger v. U.S. Air, 560 F.Supp. 202, 205 (N.D.N.Y. 1983). Additionally, one New York intermediate court of appeals considered and refused to follow the same cases the court now finds persuasive:

> We find no case in this state wherein a cause of action for abusive discharge based on a violation of public policy has been sustained and we are unable to subscribe to such a cause of action in light of the well-established principle that an at-will employee may be discharged at any time without cause.

Pavolini v. Bard Air Corp., 88 A.D.2d 714, 715, 451 N.Y.S.2d 288, 289 (1982). The highest court of the State of New York has declined opportunities to carve out exceptions to the employment-at-will doctrine. *See Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982); *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983); *see also Salanger*, 560 F.Supp. at 205; *Patrowich v. Chemical Bank*, 98 A.D.2d 318, 470 N.Y.S.2d 599 (1984).

For the above reasons, I dissent.

COURT OF APPEALS OF TEXAS
HOUSTON (14TH DIST.)

No. C14-87-768-CV

PERRY MCCLENDON,
Appellant,

v.

INGERSOLL-RAND CO.,
Appellee.

July 21, 1988

Rehearing Denied Aug. 18, 1988

Michael Y. Saunders, John W. Tavormina, Houston, for appellant.

William T. Little, Mary W. Costley, Houston, for appellee.

Before JUNELL, SEARS and CANNON, JJ.

OPINION

JUNELL, Justice.

This is a wrongful discharge case. Appellant Perry McClendon sued his former employer, Ingersoll-Rand Co., after he was released from his position as a salesman. He alleged that his employment contract was not terminable at will. He also alleged that appellee had breached an implied covenant of good faith and fair dealing, and that appellee intentionally inflicted emotional distress upon him. The trial court rendered summary judgment against appellant. We affirm.

Appellee had employed appellant for nine years and eight months at the time of the termination. Appellant stated in his petition that retirement benefits would have vested to his benefit if he had continued in appellee's employ for four more months. Furthermore, he alleged that he had laid the ground work for a large transaction with Trinity Equipment, but that the wrongful discharge deprived him of commissions from that sale. In support of his claims that the employment relationship was not terminable at will, he points to a series of writings which govern the calculation of such commissions.

At the time of the termination (Nov. 19, 1982) appellant and his employer determined commissions by reference to a "Compensation Arrangement." Each year the employer promulgated guidelines in such a document which fixed the sales quota, expense budget, and commission schedules for all sales personnel. The parties disagree over whether the compensation arrangement limited their ability to end the relationship at will. Although it does not address the issue directly, the 1982 version of the "arrangement" provides in part:

> TERMINATIONS
>
> When the employment by I-R of a commissioned Distributor Representative terminates for any reason before the equipment on which he has been recommended for commission has been invoiced, he is to be paid one-half (1/2) commission on the sales credit when the equipment is invoiced. In the determination of commission payable under this paragraph, only firm orders on which the commissioned Distributor Representative is recommended for commission and which are received up to the close of the last full working day of the Distributor Representative's actual employment shall be included, provided such orders are accepted by the Company. Any monthly commission on Rental Equipment ceases

> at the time of termination. Only equipment invoiced within ninety (90) days from termination date will qualify for commission.
>
> From the effective date of termination there will be a thirty (30) day period in which the Distributor Representative will be required to furnish I-R with all commissionable sales due him. No commission request beyond this thirty (30) day period will be honored.
>
> The Special Commission Schedule for attaining quotas does not apply if termination occurs prior to the end of the calendar year.

The document ends by noting that it is subject to change by appellee at any time, and that in any event it expires at the end of 1982. Appellant signed the document, as did a representative of appellee.

The first point of error asserts that the written compensation agreement barred application of the "at will" employment doctrine. The at will rule, as usually formulated, allows either party to an employment relationship to dissolve that relationship at any time and for any reason (or no reason at all). This customary statement of the rule constitutes a serious misrepresentation of the law, however, because employers must abide by a host of restrictions on their discretion.

Federal legislation prohibits the firing of any employee for reasons of race, color, religion, sex, or national origin. Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). Federal law likewise bars arbitrary discharge based on age. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623. The Texas Commission on Human Rights Act echoes these restrictions and additionally outlaws discharge based on handicap. TEX.REV.CIV.STAT. art. 5221k § 5.01. Retaliatory discharge is illegal in a number of circumstances. *See, e.g.*, Judiciary and Judicial Procedure Act, 28 U.S.C. § 1875 (jury service); Na-

tional Labor Relations Act, 29 U.S.C. § 158 (union activity); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660 (reporting workplace hazards); TEX.REV. CIV.STAT. art. 8307c (filing a worker's compensation claim); *see generally* Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 Baylor L.Rev. 667, 669-70 (1984) (listing other statutory limits).

Texas common law similarly curtails an employer's ability to terminate an employee when the sole reason for termination is the employee's refusal to commit an illegal act. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985).

However, appellant rests his argument not on statutory or common law bases, but on the compensation arrangement. Ingersoll-Rand convinced the trial court that the written document merely stated company policy in the area of sales commissions, and we agree. That the writing calls itself an agreement is in no way a hindrance to dissolution of the employment relation. Indeed, the document's termination paragraphs plainly contemplate that termination may occur at any time. Our conclusion is bolstered by the provision that the "agreement is subject to change, at any time, by the Company without prior written notice."

Appellant relies on *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403 (Tex.App.—Beaumont 1987, writ ref'd, n.r.e.) for the proposition that an employer's right to terminate an employee is limited when a writing so provides "*in a meaningful and special way.*" *Id.* at 406 (emphasis in original). Rather than engage in a semantic dispute over what the Beaumont Court meant, we regard the quoted phrase simply as a rhetorical flourish on the more pedestrian expression of the rule in the case it cited, *Webber v. M.W. Kellogg Co.*, 720 S.W.2d 124, 127 (Tex.App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). *Webber* states that employment is at will

absent a writing which "specifically" says otherwise. The writing at hand merely regulates sales commissions. Point of error one is overruled.

Point of error two claims that the compensation agreement is ambiguous. Although appellant maintains in his reply brief that he raised this argument below, his response to the motion for summary judgment contains no mention of ambiguity. The only conceivable reference to ambiguity appears in the response at paragraph VI, entitled "Burden of Proof." That paragraph reminds the court that Ingersoll-Rand assumes the burden of proof on all elements of its cause of action, including a showing that the "provision in question is capable of only one meaning or interpretation." The next and final sentence states that "Defendants have not met this burden, and Defendants' Motion for Summary Judgment must be denied."

This passing comment does not meet the requirement that a response *expressly present* the issue to the trial court. TEX.R.CIV.P. 166a(c); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671 (Tex. 1979). On the contrary, this is no more than a challenge to the legal sufficiency of the movant's proof, a challenge which is available on appeal in any event, regardless of whether a response has been filed. Appellant's third point of error raises just such a challenge. We overrule the second point of error.

The third point of error asserts that fact issues exist concerning interpretation of the compensation agreement. We glean no such fact issues from either of the depositions on file; neither does the instrument itself admit of any interpretation even remotely supportive of appellant's position. The third point of error is overruled.

In his fourth point of error, appellant contends that he substantially performed in regard to the Trinity Equipment deal. This contention does not appear in his

response to the motion for summary judgment, although Trinity Equipment is mentioned in paragraph III, entitled "Plaintiff Was Terminated Without Good Cause." (We will address the good cause issue in due course). Appellant's reference to the Trinity Equipment deal can only be read as fortifying his argument that good cause was lacking. Rule 166a(c) does not permit presentation of the substantial performance argument on appeal. We overrule the fourth point of error.

Point of error five squarely raises the question whether the parties incorporated a good cause limitation onto Ingersoll-Rand's otherwise unfettered discretion to terminate the relationship. Appellant presented this issue below, despite appellee's claims to the contrary, in paragraph III of his response. Appellant characterizes his employment relationship as containing an "implied in fact" agreement that he not be released except for good cause. This he calls an exception to the at will rule. As evidence of this limitation he points out that he relocated himself and his family to Dallas, implicitly relying on Ingesoll-Rand's willingness to continue his employment.

As to the existence of an implied in fact agreement, both sides' arguments cast more heat than light. The question is not whether such an "exception" in the contract is real or illusory; rather the question is simply, what is the scope of the contract? The contract of employment was never reduced to writing, contained no specification of duration and lacked any limitation on the parties' abilities to go their separate ways. Ingersoll-Rand presented affidavit testimony which corroborates our reading of the compensation agreement. Accordingly, the common law rule applies. *See East Line & R.R. Ry. Co. v. Scott*, 72 Tex. 70, 10 S.W. 99 (1888). The fifth point of error is overruled.

In point of error six appellant asks us to create an implied covenant of good faith and fair dealing. The starting point in our analysis is Supreme Court precedent. As recently as five years ago the Supreme Court expressly rejected an invitation to recognize such a rule. *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983). Appellant regards *English*, however, as incapable of survival without extraordinary means, in view of *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex. 1987). In the latter case the Court imposed such a covenant on insurers because of a special relationship between insurers and their insureds. Nevertheless, *Arnold* furnishes us no warrant for renouncing a binding precedent and fashioning a new rule to the contrary.

If we were to recogize the employer-employee relationship as "special," that would be tantamount to putting every commercial contract under the umbrella of *Arnold:* vendor-purchaser, lessor-lessee, lender-borrower. Such an extension would undermine the very foundation of *Arnold* by denying that an insurance relationship is deserving of any special protection: it would in effect repudiate the Court's rationale to confuse the exceptional with the everyday.

Furthermore, the Supreme Court has gone on record as disapproving encumbrances on free movement in the workplace. *See Bergman v. Norris of Houston*, 734 S.W.2d 673 (Tex. 1987); *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168 (Tex. 1987). An employee is as free to leave the relationship as an employer in a competitive environment: "it is but a normal effect of a free market economy." *Hill v. Mobile*, at 172. *See also* Tex.Const. art. I, § 26.

Finally, as discussed earlier, there is no want of legislation which restricts an employer's ability to dissolve an employment contract. It would be impertinent for us to arrogate to ourselves the right to pass additional laws under the guise of deciding cases. TEX. CONST. art. II, § 1. As Chief Justice Guittard said in a wrongful discharge case virtually identical to this one, "In our system of constitutional government, the primary agency to de-

clare the policy of the state is the legislature. Although legislative processes may be imperfect, appeals for judicial legislation based on legislative inaction betray a loss of faith in democratic government." *Watson v. Zep Mfg. Co.*, 582 S.W.2d 178, 180 (Tex.Civ.App.—Dallas 1979, writ ref'd n.r.e.); *accord Molder v. Southwestern Bell Tel. Co.*, 665 S.W.2d 175, 177 (Tex.App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) ("the legislature is the appropriate agency for effecting a change in policy regarding the employer-employee relationship."). To say that the at will doctrine—a misnomer to begin with—was judicially created and can therefore be judicially abolished is to misstate history. The at will doctrine was not generated *ex nihilo* in 1888 against a backdrop of some contrary legal regime. *See* Tex.Civ.Prac. & Rem. Code § 5.001 (adopting the common law of England as the rule of decision when no local source can be found); Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 Baylor L.Rev. 667, 667-68 (1984) (tracing the history of the rule back to England). The sixth point of error is overruled.

The final point of error assigns error to the adverse summary judgment on appellant's claim of intentional infliction of emotional distress. The summary judgment proof establishes beyond dispute that the discharge of appellant was neither extreme nor outrageous. (Indeed, appellant incorrectly concluded that being discharged before ten years of service would prevent him from collecting certain benefits. He was in fact never denied those benefits). Ingersoll-Rand did nothing more than react to an economic downturn by reducing its sales force. Such conduct is in no way actionable. The seventh point of error is overruled.

The judgment is affirmed.

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON,
Plaintiff,
vs.

INGERSOLL-RAND CO. d/b/a INGERSOLL-RAND CO. CONSTRUCTION EQUIPMENT GROUP,
Defendant.

[July 31, 1987]

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

BE IT REMEMBERED that on the 27th day of July, 1987, the Motion for Summary Judgment filed in this cause pursuant to Rule 166A of the Texas Rules of Civil Procedure by INGERSOLL-RAND COMPANY, d/b/a INGERSOLL-RAND CO. CONSTRUCTION EQUIPMENT GROUP, Defendant. Proper notice of the hearing on this Motion for Summary Judgment was provided to opposing counsel. After considering the Defendant's Motion and the Summary Judgment evidence submitted in support thereof, after reviewing the Plaintiff's Response to this Motion for Summary Judgment and after entertaining argument of counsel, this Court is of the opinion that the Defendant's Motion is good and should be granted as hereinafter provided. Accordingly, it is hereby

ORDERED that the Defendant's Motion for Summary Judgment filed in this cause pursuant to Rule 166A of

the Texas Rules of Civil Procedure is hereby GRANTED in all respects. Accordingly, it is also

ORDERED, ADJUDGED and DECREED that PERRY McCLENDON, Plaintiff, take nothing by reason of his lawsuit against INGERSOLL-RAND COMPANY d/b/a INGERSOLL-RAND CO. CONSTRUCTION EQUIPMENT GROUP, Defendant. Further, that said Defendant shall so forth with its costs to be paid by the Plaintiff herein, for which let execution issue.

SIGNED on this the 31 day of of July, 1987.

/s/ [Illegible]
Judge Presiding

Approved as to form and content:

GILPIN, POHL & BENNETT

By: /s/ William T. Little
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SUPREME COURT OF TEXAS
P.O. Box 12248
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John T. Adams, Clerk

November 15, 1989

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RE: Case No. C-7973

STYLE: PERRY MCCLENDON
v. INGERSOLL-RAND COMPANY, d/b/a INGERSOLL-RAND COMPANY

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Respectfully yours,

JOHN T. ADAMS
Clerk

By /s/ [Illegible]
Deputy

FOURTEENTH COURT OF APPEALS
1307 San Farinto, 11th Floor
Houston, Texas 77002

August 18, 1988

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RE: Case No. 14-87-00768-CV
Trial Court Case No. 84-44080

STYLE: McCLENDON, PERRY
v. INGERSOLL-RAND COMPANY

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, September 19, 1988.

Respectfully yours,

MARY JANE SMART
Clerk

/s/ Charlene Mitchell
Deputy

Supreme Court, U.S.
FILED
MAR 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

89-1298

NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY McCLENDON,
Respondent.

RESPONDENT'S BRIEF IN RESPONSE TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the State of Texas may, judicially and/or legislatively, create a cause of action for an employee whose employment is subject to termination at the employer's will when such employee is terminated in order for the employer to avoid, among other things, making future pension plan contributions.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were: Perry McClendon and the Ingersoll-Rand Company. Mr. McClendon has no interest in any corporate entity or partnership.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 USCS § 1140

§ 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 USCS § 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 USCS § 1132] shall be applicable in the enforcement of this section.

29 USCS § 1144

§ 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003 (a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

* * * *

(c) Definitions. For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY McCLENDON,
Respondent.

RESPONDENT'S BRIEF IN RESPONSE TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Perry McClendon respectfully submits this brief in opposition to Ingersoll Rand's petition for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Texas (App., *infra,* at 1a) is reported at 779 S.W.2d 69 (Tex. 1989). The opinion of the 14th Court of Appeals of Texas (App., *infra,* at 18a) is reported at 757 S.W.2d 816. The opinion of the 133rd Judicial District Court of Harris County, Texas is unreported.

STATEMENT OF THE CASE

This is a wrongful employment termination case which presents no federal question. Respondent makes no claims for pension benefits and there are no issues with respect to the administration or regulation of a pension plan. Shortly after the litigation began, Petitioner, Ingersoll Rand, vested Mr. McClendon's pension. Since that time, Respondent has pursued only his claims for damages arising out of the wrongful termination of his employment.

Respondent induced Mr. McClendon to uproot his family to move to a strange city in order to expand Ingersoll Rand's sales territory. Once Mr. McClendon pioneered a new territory and was about to earn substantial commissions, Ingersoll Rand fired him four months before his ten year pension vesting anniversary. Suit was then filed in the 133rd Judicial District Court of Harris County, Texas, alleging, among other things, a Texas state cause of action for wrongful employment termination and breach of good faith and fair dealing. Shortly after the suit was filed, Ingersoll Rand informed Mr. McClendon that he was fully vested in his pension benefits. Accordingly, the suit before this Court seeks no damages for pension benefits and presents no issues with respect to the administration or regulation of a pension plan. Rather, the suit seeks lost future wages, mental anguish and punitive damages engendered by Petitioner's wrongful termination of Mr. McClendon's employment.

The trial court granted a motion for summary judgment, and that ruling was affirmed by the 14th Court of Appeals. The appellate court held that Mr. McClendon's employment

was an "at will" employment which did not fall within any of the specific exceptions that prohibited employment termination in Texas. The appellate court also refused to apply the doctrine of good faith and fair dealing to the issue of employment termination.

The Supreme Court of Texas granted writ on the issue of whether the doctrine of good faith and fair dealing should apply to the employment setting. The Texas Supreme Court's decision, however, did not reach that issue. Instead, the Court created an additional exception to the Texas employment-at-will doctrine and held that a terminated employee can recover damages in Texas if the principal reason for the employment termination was the employer's desire to avoid contributing to, or paying benefits under, the employee's pension fund (Opinion cited in Appendix).

The majority opinion by the Texas Supreme Court (footnote 3), specifically stated that the wrongful termination cause of action was not preempted by the Employee Retirement Income Security Act of 1974 (ERISA). Each state is entitled to develop its own laws with respect to wrongful employment termination, and the Texas Supreme Court has done so in this case.

SUMMARY OF ARGUMENT

Petitioner has conceded that Mr. McClendon has received and will receive all of his pension rights and benefits. This is not a case seeking any pension rights or benefits. Rather, it is a case to determine whether Petitioner's motives and reasons for terminating Mr. McClendon's employment were proper under Texas law. This is not a federal question and has absolutely nothing

to do with the Employment Retirement Income Security Act of 1974 ("ERISA"), or the administration or regulation of a pension plan. The Texas Supreme Court has held that a plaintiff can recover damages for employment termination principally motivated by an attempt to avoid pension obligations. Those damages are completely separate from damages and causes of action sanctioned under ERISA.

Prior to this latest exception to the employment-at-will doctrine, the Texas Supreme Court created an exception whereby a plaintiff could recover damages if he or she was fired for refusing to commit a crime. *Sabine Pilot v. Hauck*, 687 S.W.2d 733 (Tex. 1985). Under *Sabine Pilot*, the fact finder must determine whether the employment termination was motivated by such a refusal. The crime can be a violation of a federal, state or local law; the law itself is not the relevant issue. Rather, the issue is whether the employer's decision to terminate was motivated by the refusal to commit the crime. The *McClendon* exception to the "at will" doctrine is analogous. The specific pension plan, its contents or its administration are not relevant issues. Rather, the issue is whether the employer's decision to terminate was motivated by the employer's attempt to avoid its pension obligations. Consequently, ERISA and Ingersoll Rand's pension plan are irrelevant to this case.

Petitioner's brief does not inform this Honorable Court that there is no issue as to pension benefits in this case or that petitioner has admitted that they owe and will pay those benefits. These crucial facts, however, demonstrate that the Texas Supreme Court was correct in rejecting the preemption argument.

The preemption provision of ERISA was included in that Act to standardize the administration and regulation of pension plans so that employers would not be subject to different rules and regulations when they operated across state lines. The intent of this provision was to forestall the administrative nightmares that would otherwise follow and enable these plans to be managed in a more efficient manner. This Court has stated that permitting a Federal law to preempt a state law is not favored and will not be done unless Congress has unmistakably ordained such a result to occur. The present fact situation is not one to which the ERISA preemption provision was intended to apply.

It has generally been stated that state laws preempted by the ERISA preemption provision are those that (1) provide an alternative cause of action to employees to collect benefits protected by ERISA; (2) refer specifically to ERISA plans and apply solely to them; or (3) interfere with the calculation of benefits owed to an employee. *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142, 146 (2d Cir. 1989).

The subject suit seeks damages for breach of employment contract, lost future wages, mental anguish and punitive damages. The case has nothing to do with the collection of benefits protected by ERISA, the interpretation of a pension plan, or the calculation of pension benefits. In addition, any and all recovered damages would be paid by the employer and not the plan or its fiduciary. Accordingly, this cause of action should not be preempted by ERISA.

In addition to the specific reasons for the denial of preemption, the general purpose of ERISA mandates that

this case remain a state cause of action. ERISA was originally conceived to safeguard employees from "such abuses as self-dealing, imprudent investing, and misappropriation of plan funds." *Fort Halifax Packing Co., Inc. v. Coyne,* 482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987), quoting 120 Cong. Rec. 29932 (1974). It is clear from the facts that this case has nothing to do with the operation or administration of Petitioner's pension fund. Accordingly, this case has nothing to do with ERISA and preemption is inappropriate.

ARGUMENT

I.

SINCE RESPONDENT SEEKS LOST FUTURE WAGES, MENTAL ANGUISH AND PUNITIVE DAMAGES AND NOT PENSION BENEFITS, ERISA PREEMPTION DOES NOT APPLY.

Respondent is not seeking any pension benefits. Despite Petitioner's attempts to ignore this crucial fact, this fact alone is sufficient to defeat preemption. In *Totton v. New York Life Insurance Co.,* 685 F.Supp. 27, 30 (D. Conn. 1987), the Court stated that preemption is improper if the cause of action has only a tenuous, remote or peripheral effect on a pension plan. *See, also, Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 121, n. 21, 103 S.Ct. 2890, 2901, n. 21, 77 L.Ed.2d 490 (1985). In addition to the Texas Supreme Court, the Eastern District of New York has twice held that an employee may pursue a state law cause of action for the tort of wrongful discharge based on allegations that the employee was terminated solely because the employer sought to deprive the employee of his pension benefits. *Savodnic v. Korvettes, Inc.,* 488 F.Supp. 822 (E.D. N.Y. 1980); *Hovey v. Lutheran Medical Center,* 516 F.Supp. 554 (E.D. N.Y. 1981).

In the cases cited by the Petitioner, unlike the case before the Court, the plaintiffs sought pension benefits under specific pension plans. Since Mr. McClendon does not seek any pension benefits, this case is easily distinguishable from those cited by the Petitioner. This distinction was also highlighted in the Texas Supreme Court's opinion:

> Two federal district court cases have held that a claim for wrongful discharge in order to avoid the payment of pension funds is preempted by ERISA. *Pratt v. Delta Air Lines, Inc.,* 675 F.Supp. 991 (D. Md. 1987); *Cahall v. Westinghouse Electric Corp.,* 644 F.Supp. 806 (E.D. Penn. 1986). These cases, however, can be distinguished from the present action because here the plaintiff acknowledges in his brief to the court of appeals that he is not seeking lost pension benefits but is instead seeking lost future wages, mental anguish and punitive damages as a result of the wrongful discharge.

779 S.W.2d 69, 71, footnote 3 (Tex. 1989).

Since Respondent seeks no pension benefits in this case, preemption is inapplicable.

In addition, the regulation or administration of Ingersoll Rand's pension plan is totally irrelevant to this case. The only question is whether Ingersoll Rand's principal motivation for termination was to avoid the payment of pension benefits. It is clear that the Court must focus

upon the conduct to which a law is applied and not on the form or label of the law. *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985). A proper preemption analysis therefore, requires inquiry into whether the conduct challenged by a given state law claim was part of the administration of an employee benefit plan. *Id.* at 1505. As stated, Respondent's cause of action has nothing to do with the regulation or administration of Ingersoll-Rand's employee benefit plan. Rather, the cause of action focuses on Petitioner's motivation for the termination of Respondent's employment. Such a cause of action cannot be and is not preempted by ERISA.

This Honorable Court has previously stated that ERISA's preemption provision does not refer to state laws relating to "employee benefits," but to state laws relating to "employee benefit plans." *Fort Halifax, supra,* at 2215. It is disingenuous, at best, for Petitioner to assert that this case involves Ingersoll Rand's employee benefit plans. Rather, the case creates an exception to the Texas employment-at-will doctrine in an effort to protect Texas employees from unwarranted termination. Texas has long adhered to the employment-at-will doctrine, which allows an employer to terminate an employee for any reason. *East Line & R.R.R. Co. v. Scott,* 72 Tex. 70, 10 S.W. 99 (Tex. 1888). Although the Texas Supreme Court has permitted this doctrine to remain virtually intact for over one century, the Court has recently begun to chip away at the harshness of the doctrine. In *Sabine Pilot Service, Inc. v. Hauck,* 687 S.W.2d 733 (Tex. 1985), the Texas Supreme Court recognized a cause of action for plaintiffs alleging that employment termination was notivated by the employee's refusal to perform an illegal act. In basing its holding on the same public policy rationale included

in *Hauck,* the Texas Supreme Court in this case held that employment terminations were improper if motivated by an attempt to avoid pension fund payments.

A comparison of these two recent exceptions to the Texas at will doctrine points out the weakness of Petitioner's preemption argument. If an employee is fired for refusing to commit a crime, it is irrelevant if it is a state, federal or local crime. The employer's *motivation* is the relevant issue, and the type of crime is irrelevant. Similarly, if an employee is fired so an employer can avoid making pension contributions, the regulation or administration of the pension plan is irrelevant. Only the employer's *motivation* is relevant, and the substance or administration of the pension plan is unaffected.

Every state in the union has developed a common law governing employment terminations, and the states give employers a vast array of discretion with respect to employment terminations. For example, the employer and employee may contractually agree that an employment relationship may not be terminated without good cause, subject to whatever requisites are present in a state's general common law. *See e.g., Fairmont Creamery Co. v. Ewing,* 43 Ohio App. 191, 182 N.E. 883 (1932). It is axiomatic that each state's laws affect the employment relationship between the employer and employee, including employment terminations. Absent the specific federal statutes governing employment discrimination (which do not apply to this case), the sovereign power of each state enables the state to formulate its own laws. That is what the Texas Supreme Court has done in this case. Its ruling has no effect on ERISA or any pension plan and preemption is not applicable.

II.

PREEMPTION OF A STATE LAW IS NOT FAVORED ABSENT PERSUASIVE REASONS, AND THE REASONS FOR PREEMPTION ARTICULATED BY THE PETITIONER DO NOT MEET THIS STANDARD.

This Court has stated that preemption of a state law by a federal statute is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Chicago & Northwestern Transportation Co. v. Kalo Rig & Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 1130 and 67 L.Ed. 2d 258 (1981), quoting *Florida Lime & Avocado Growers, Inc. v. Pall*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 148 (1963). Since Petitioner has argued that the ERISA preemption applies to this case, "the purpose of Congress is the ultimate touchstone" to ascertain whether in fact Congress intended to preempt the type of action taken by the Texas Supreme Court. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 747, 104 S.Ct. 2380, 2393, 95 L.Ed.2d 728 (1985). *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed.2d 443 (1978).

In *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211, 2216, 96 L.Ed.2d 1 (1987), this Court cited the Congressional Record and ascertained that the ERISA preemption provisions were designed to standardize the administration and regulation of pension plans. Neither the administration nor regulation of a pension plan is involved in this case, and Respondent's cause of action should not be preempted.

III.

ABSENT A SUIT FOR PENSION BENEFITS OR A SUIT REGARDING THE ADMINISTRATION OR REGULATION OF A PENSION PLAN, PREEMPTION DOES NOT APPLY.

Generally, the state laws preempted by ERISA are those that (1) provide an alternative course of action to employees to collect benefits protected by ERISA; (2) refer specifically to ERISA plans and apply solely to them; or (3) interfere with the calculation of benefits owed to an employee. *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142, 146 (2d Cir. 1989). All cases cited by Petitioner in favor of preemption, unlike the present case, bear some relationship to the administration or regulation of a pension plan and/or the payment of pension benefits. A brief summary of the cases cited by the Petitioner demonstrates each case's inapplicability to the present case. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981) (state statute seeking to prevent a procedure known as "integration" was preempted by ERISA because that statute eliminated one method for calculating pension benefits that was otherwise permissible under Federal law); *Shaw v. Delta Airlines, Inc.*, 453 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) (state law precluding discrimination in employee benefit programs with respect to pregnant women was preempted by ERISA); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) (ERISA preempts any state common law tort or contract claim asserting improper processing of a claim for benefits under an ERISA plan); *Dependahl v. Fallstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981) (state

common law claims resulting from the determination of severance payments and interference with an ERISA-covered whole life insurance plan were preempted by ERISA); *Authier v. Ginsberg,* 757 F.2d 796 (6th Cir. 1985) (ERISA fiduciary could not bring a state law cause of action for wrongful discharge from his position as an ERISA fiduciary under the Act); *Pane v. RCA Corp.,* 868 F.2d 631 (3d Cir. 1989) (ERISA preempted a discharged employee from pursuing a state law breach of contract action to ascertain whether the employee was entitled to be included in an ERISA-covered plan); *Fitzgerald v. Kodex Corp.,* 882 F.2d 586 (1st Cir. 1989) (ERISA preempted a state law action brought by a terminated husband who claimed that his termination was related to the denial of his wife's health benefits under an ERISA plan).

Every one of these cases, unlike the present case, dealt with pension benefits or the administration or regulation of a pension plan. Since the present case does not involve any of those issues, ERISA preemption does not apply.

IV.

ERISA PREEMPTION DOES NOT APPLY SINCE INGERSOLL RAND WILL PAY THE DAMAGES AND THE DAMAGES WILL NOT AFFECT THE ADMINISTRATION OF PETITIONER'S PENSION PLAN AND WILL NOT BE PAID OUT OF PLAN FUNDS BY THE PLAN FIDUCIARY.

ERISA preemption should be applied sparingly, if at all, in cases where the employer itself will have to pay the damages. In *Maxfield v. Central States Health, Welfare*

& Pension Funds, 559 F.Supp. 158 (N.D. Ill. 1982), a terminated employee sought to recover punitive damages resulting from an alleged violation of ERISA. The Court held that ERISA precluded the recovery of punitive damages for the alleged violations, basing its holding upon the fact that the pension fund itself would have to pay these damages. The Court reasoned that such a result would be contrary to the remedial nature of ERISA. *Maxfield* at 160. The Court's language, however, implies that an alternate result may have been reached if the employer and not the pension plan fiduciary would have been liable for any damages awarded.

Other Federal Courts have held that ERISA does not preempt a state law cause of action if the employer and not the pension plan fiduciary, would ultimately be liable for any damages awarded. For example, in *Greenblatt v. Budd Co.,* 666 F.Supp. 735 (E.D. Pa. 1987), a terminated employee claimed that misrepresentations were made about his future pension benefits, and the employee alleged that he relied upon these misrepresentations to his detriment. The employer sought to invoke the ERISA preemption provision. The Court held that the cause of action was not preempted by ERISA and supported its holding by stating that the pension plan fiduciary would not have to pay the damages.

Similarly, in *Totton v. New York Life Insurance Co.,* 685 F.Supp. 27 (D. Conn. 1987), a terminated employee brought a breach of contract suit against the employer and claimed the loss of future pension benefits as one damage element. The Court held that the cause of action was not preempted by ERISA. The *Totton* Court also held that the recovery of such benefits would not affect

the administration of the benefits plan nor would payment be made by the plan fiduciary.

In the present case, Ingersoll Rand will be liable for all damages recovered by Respondent. Mr. McClendon seeks no benefits from the plan; his lawsuit does not affect the administration of the plan's benefits; and no payment would be made by the plan fiduciary. Accordingly, Respondent's causes of action are not preempted by ERISA.

V.

THE TEXAS SUPREME COURT'S DECISION IS CONSISTENT WITH THE CONGRESSIONAL INTENT REGARDING ERISA PREEMPTION.

Petitioner's argument for ERISA preemption rests precariously on the incorrect premise that Ingersoll Rand's pension plan is affected by the case. Once this incorrect premise is exposed, it is clear that the Texas Supreme Court's decision is consistent with the Congressional intent regarding ERISA and its regulatory concerns.

In *Fort Halifax, supra,* this Court included a lengthy discussion upon the regulatory concerns for which ERISA was enacted. Without repeating the discussion contained in that opinion, the key motivating factors for this statutory scheme were that Congress desired to safeguard employees from "such abuses as self-dealing, imprudent investing and misappropriation of plan funds." *Fort Halifax,* 107 S.Ct. at 2219, quoting 120 Cong. Rec. 29932 (1974). These are all factors that protect employees. The Texas Supreme Court's holding is totally consistent with this motivation. The Texas Supreme

Court's *McClendon* exception to the at will doctrine has absolutely no relationship to the types of abuses from which ERISA was designed to protect employees. The holding in no way alters the law with respect to the commingling of funds, self-dealing, or any other abuse that would clearly be for ERISA to govern. Rather, this opinion simply represents one state's decision to change its employment law to include a much needed protection for Texas workers. The opinion has absolutely no effect on the regulation or administration of any pension funds.

In *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 103 S.Ct. 2840, 77 L.Ed.2d 420 (1983), this Court addressed whether ERISA generally permits state tax authorities to collect unpaid state income taxes by levying upon funds held in trust for the taxpayers under an ERISA covered vacation benefit plan. This Court held that a state's right to enforce its tax levies is not of central concern to the ERISA statute. That is, even though the California statute would subject certain funds held in an ERISA plan to a state levy, this Court still held that a state's right to enforce its tax levies is not something about which ERISA is concerned. This holding clearly impacts upon an ERISA plan with far more force than does the holding by the Texas Supreme Court in this case. The *Franchise Tax Board* holding enables the state, under the proper circumstances, to remove certain funds from a pension plan that would otherwise be available to plan participants. The Texas Supreme Court's holding, on the other hand, has no effect on pension plans and would require the employer, not the pension fund, to compensate the plaintiff.

VI.

FEDERAL DISTRICT COURTS HAVE HELD THAT STATE CAUSES OF ACTION FOR THE LOSS OF FUTURE OR PROSPECTIVE PENSION BENEFITS ARE NOT PREEMPTED BY ERISA.

In *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985), a terminated employee sought to recover, among other things, lost accumulated and prospective pension benefits. Although accumulated benefits were preempted by ERISA, the Court held that the employee's state claim for the loss of prospective benefits was not preempted by ERISA. The Court noted that the claim raised no issue concerning matters pertaining to the regulation and administration of the pension plan and stated that the basic issue involved in this claim is no different from the issue that would be involved in a claim alleging that the employer conspired to force the employee to accept lower wages. *Scott* at 1515. The Ninth Circuit has clearly held, therefore, that claims are not preempted by ERISA unless they involve the regulation or administration of a pension plan. Based on this analysis, preemption does not apply to the case before the Court.

The Fourth Circuit adopted a similar analysis in *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir. 1989). This case involved a wrongful termination action alleging, among other things, breach of an employment contract. The employment termination impacted upon the pension benefits available to the employee, and the state law cause of action sought to recover lost prospective benefits as damages. The Court held that the state law causes of action relating to loss of prospective pension benefits were not preempted by ERISA. The Court based this holding on

the analysis that the claims would not (1) submit the employer to conflicting employer obligations and variable standards of recovery; (2) determine whether any benefits are paid; (3) affect the administration of benefits under the plan; or (4) be paid by the plan fiduciary with plan funds. *Pizlo* at 120.

In *Schlenz v. United Airlines, Inc.*, 678 F.Supp. 230 (N.D. Cal. 1988), a case similar to the present case, a terminated employee brought a state law cause of action against the employer alleging that the employer terminated the employment because the employee (1) was about to vest in a pension plan; (2) was a higher paid employee because of seniority; and (3) was soon to be recalled to a higher paying position with the company. The basis of plaintiff's suit was that the plaintiff sought to recover damages for the lost opportunity to earn future benefits, including pension plan benefits, as a result of the employer's wrongful conduct. The Court held that the state law wrongful termination cause of action was not preempted by ERISA because it was unrelated to an employee benefit plan and touched, at best, only peripherally on ERISA.

The present case is more remote from an ERISA claim than the above cited cases. In this case, the Respondent seeks absolutely no pension benefits, past or future. Respondent has received his pension benefits. What he did not receive was continued employment; and the evidence shows that he was fired because the Petitioner wanted to avoid its pension obligation. The Texas Supreme Court has correctly held that the cause of action created by Petitioner's egregious conduct is a state cause of action that is not preempted by ERISA.

The Texas Supreme Court correctly held that such employer conduct is against sound public policy. The Court recognized that the employment-at-will doctrine should not be used by an employer as a sword to exploit unfortunate employees and a shield to excuse the avoidance of pension plan obligations. Accordingly, the Supreme Court held that an employment termination engendered by an attempt to avoid pension obligations is actionable in the State of Texas. This holding has absolutely no effect on the regulation or administration of pension plans. Accordingly, Petitioner's requests for preemption and writ should be in all things denied.

VII.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Perry McCLENDON,
Petitioner,

v.

INGERSOLL-RAND COMPANY, d/b/a Ingersoll-Rand Company Construction Equipment Group,
Respondent.

No. C-7973.

Supreme Court of Texas.

Oct. 18, 1989.

Rehearing Denied Nov. 15, 1989.

SPEARS, Justice.

This is a suit for wrongful discharge. Perry McClendon sued his former employer, Ingersoll-Rand Company. McClendon alleged that he was discharged from his employment so that Ingersoll-Rand could escape its obligation to contribute to his pension fund. The trial court rendered summary judgment in favor of Ingersoll-Rand. The court of appeals affirmed. 757 S.W.2d 816 (1988). We reverse the judgment of the court of appeals and remand the cause to the trial court.

In August 1972, McClendon began employment with Ingersoll-Rand as a salesperson and distributor of construction equipment. He was paid on a commission basis in accordance with the terms of a "Compensation Arrangement" that was to remain in effect through December 1982; however, this "compensation arrangement" did not specifically dictate the term of McClendon's employment.

In late 1979, Ingersoll-Rand transferred McClendon from San Antonio to Dallas so that he could develop a potentially lucrative market there. McClendon secured a substantial amount of business in Dallas, and McClendon's supervisor later testified that he was satisfied with McClendon's job performance. Nevertheless, Ingersoll-Rand fired McClendon on November 19, 1982. Ingersoll-Rand justified McClendon's termination by claiming that external economic factors mandated a work force reduction of *one* salesperson.

McClendon's termination from employment occurred after he had accumulated nine years and eight months of service to Ingersoll-Rand. Further, the termination occurred exactly four months prior to the vesting of McClendon's retirement and pension benefits, at which time Ingersoll-Rand would have been required to contribute to McClendon's pension fund.

In filing suit, McClendon alleged that Ingersoll-Rand breached its employment contract with him and breached its duty of good faith and fair dealing in connection with the employment relationship.[1] In addition, McClendon asserted a cause of action for wrongful discharge and alleged that Ingersoll-Rand had terminated him to escape its obligation to contribute to his pension fund[2] and to avoid paying him the commission from a particular sale.

1. Because we have decided this cause on other grounds, we need not reach the issues relating to the tort duty of good faith and fair dealing and we express no view on this matter.

2. Although Ingersoll-Rand ultimately allowed McClendon's pension to vest, McClendon argues that such subsequent vesting does not retroactively reverse any bad faith conduct in which Ingersoll-Rand engaged when it terminated McClendon to avoid pension contributions. McClendon argues that the pension plan issue is relevant in order to explain the motivation behind Ingersoll-Rand's initial termination of McClendon.

At issue is whether McClendon's allegations state a cause of action under Texas law. Texas courts have traditionally followed the employment-at-will doctrine which allows that employment for an indefinite term may be ended at will and without cause. *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 10 S.W. 99 (1888); *Molder v. Southwestern Bell Tel. Co.*, 665 S.W.2d 175 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

Although this doctrine has been widely accepted, numerous exceptions and limitations have been placed on its application. For example, federal law prohibits the discharge of an employee because of age, race, religion, sex, color or national origin. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d) (1982 & Supp. III 1985); Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1977). Federal law also prohibits a private employer from discharging an employee who exercises his rights under the Fair Labor Standards Act to minimum wage and overtime. 29 U.S.C. § 215 (a)(3) (1977 & Supp. 1982). Similarly, Texas has enacted various statutes that restrict an employer's discretion to terminate the employment relationship. *See, e.g.*, TEX. REV. CIV. STAT. art. 5207a (discharge based on union membership); TEX. CIV. PRAC. & REM. CODE § 122.001 (discharge because of jury service); TEX. REV. CIV. STAT. art. 8307c (discharge for filing a worker's compensation claim); TEX. GOV'T CODE § 431.006 (discharge because of active duty in the state military forces); TEX. REV. CIV. STAT. art. 5221k, § 5.01 (discharge based on race, color, handicap, religion, sex, national origin or age).

In addition to state and federal legislation, courts have developed various common-law restraints on the doctrine

of employment-at-will. In *Sabine Pilot Service, Inc. v. Hauck,* 687 S.W.2d 733 (Tex. 1985), this court recognized a cause of action for a plaintiff alleging that he was discharged for refusing to perform an illegal act. In creating this exception to the employment-at-will doctrine, we considered the changes in American society and in the employer/employee relationship over the course of the past century, and we held that public policy, as expressed in both state and federal law, required such an exception. *See also Petermann v. International Brotherhood of Teamsters, Local 396,* 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (recognizing public policy exception to employment-at-will doctrine in case of employee alleging that he was wrongfully discharged for refusing to perjure himself before a legislative investigative committee).

Numerous other states have accepted the principle that public policy can limit an employer's power to discharge at-will employees. *See Kelsay v. Motorola, Inc.,* 74 Ill. 2d 172, 23 Ill. Dec. 559, 384 N.E.2d 353 (1978); *Frampton v. Central Indiana Gas Co.,* 260 Ind. 249, 297 N.E.2d 425 (1973); *Fortune v. National Cash Register Co.,* 373 Mass. 96, 364 N.E.2d 1251 (1977); *Monge v. Beebe Rubber Co.,* 114 N.H. 130, 316 A.2d 549 (1974); *Nees v. Hocks,* 272 Or. 210, 536 P.2d 512 (1975); *Harless v. First Nat'l Bank,* 162 W. Va. 116, 246 S.E.2d 270 (1978). More specifically, the Eastern District of New York has recognized a cause of action for wrongful discharge when an employee alleges that he was terminated to deprive him of pension benefits. *Hovey v. Lutheran Medical Center,* 516 F.Supp. 554 (E.D.N.Y. 1981). The court expressly recognized the public policy associated with the preservation of pension plans for both governmental and private employees. *Id.*

at 558; *see also Savodnik v. Korvettes, Inc.,* 488 F.Supp. 822, 826 (E.D.N.Y. 1980) (recognizing strong public policy "favoring the protection of integrity in pension plans" and allowing wrongful discharge cause of action for plaintiff who alleged that employer fired him to avoid paying pension benefits).

In determining whether McClendon has stated a cause of action under Texas law, we recognize that the state has an interest in protecting employees' interests in pension plans. *Cf.* TEX. REV. CIV. STAT., Title 110B (Vernon 1988) (reflecting state's interest in preserving pension plans for public employees). Also, the Employee Retirement Income Security Act (ERISA) makes it unlawful for any person to discharge, fine, suspend or discriminate against any employee for the purpose of interfering with that employee's potential rights under a pension plan. 29 U.S.C. § 1140. The very passage of ERISA demonstrates the great significance attached to income security for retirement purposes.

We hold that public policy favors the protection of integrity in pension plans and requires in this case an exception to the employment-at-will doctrine. This exception allows recovery when the plaintiff proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund.[3]

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3. Two federal district court cases have held that a claim for wrongful discharge in order to avoid the payment of pension funds is preempted by ERISA. *Pratt v. Delta Air Lines, Inc.,* 675 F.Supp. 991 (D. Md. 1987); *Cahall v. Westinghouse Electric Corp.,* 644 F. Supp. 806 (E.D. Penn. 1986). These cases, however, can be distinguished from the present action because here the plaintiff acknowledged in his brief to the court of appeals that he is *not* seeking lost *pension benefits* but is instead seeking lost future wages, mental anguish and punitive damages as a result of the wrongful discharge.

We reverse the judgment of the court of appeals and remand this cause to the trial court for trial.

COOK, J., files a dissenting opinion in which PHILLIPS, C.J., and HECHT, J., join.

GONZALEZ, J., files a dissenting opinion.

COOK, Justice, dissenting.

I dissent. The central issue in this case, as argued and briefed by the parties, concerns whether the duty or implied covenant of good faith and fair dealing exists in the context of an employment-at-will relationship. The majority opinion not only fails to address this issue, but also creates a state cause of action based on conduct already prohibited by federal statute. Given the adverse impact that the majority opinion will have upon our court systems, I would affirm the judgment of the court of appeals.

I. ERISA

The court reminds us that § 510 of the Employee Retirement Income Security Act (ERISA) makes it unlawful for any person to interfere intentionally with impending pension eligibility. 29 U.S.C. § 1140 (1985). According to the court, ERISA demonstrates the great significance attached to income security for retirement.

I agree. ERISA's § 510 is indeed significant, so significant that it confers upon employees a federal version of the cause of action created by this court, confines litigation of the federal cause of action to the federal courts, and preempts the state cause of action.

Section 510 of ERISA expressly states that it is "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan." *Id.* The case law has interpreted § 510 to delineate a cause of action that applies in precisely the same situations as the one considered today. *See, e.g., Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987).

Congress provided for the enforcement of § 510 in § 502, which comprises the statute's civil enforcement provisions. 29 U.S.C. at § 1132. Section 502(e)(1) confines litigation of certain claims to federal court. *Id.* at § 1132(a)(3). One of those claims is the § 510 action. *Id.;* 29 U.S.C. at § 1140. Consequently, an ERISA claimant who sues for termination resulting from intent to avoid pension responsibility may sue only in federal court.

The provisions of § 510 do not initially appear to affect the law set out today. It is, after all, possible for state and federal law to address the same problem. Section 514 of ERISA, however, makes it clear that duplication of effort in this area of the law is simply not allowed. 29 U.S.C. § 1144. Under § 514(a) all provisions of the subchapter in which § 510 is contained preempt state laws that "relate to" employee benefit plans. *Id.* at § 1144(a). In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 57, 107 S.Ct. 1549, 1558, 95 L.Ed.2d 39 (1987), the United States Supreme Court decided that § 514 superseded a state common law that related to an employee benefit plan. The powerful effect of § 514(a) was repeatedly emphasized by the Court, which expressed its

unanimous conviction that Congress intended to establish pension plan regulation as an exclusively federal concern. *Id.* at 45-47, 52-56, 107 S.Ct. at 1551-53, 1555-57.

There can be no doubt that the law created today by this court relates to a pension plan and directly conflicts with the specific provisions of § 510 establishing a federal cause of action under ERISA. Consequently, that section preempts our new law through § 514(a). *See Sorosky v. Burroughs Corp.,* 826 F.2d 794 (9th Cir. 1987). Furthermore, because preemption of the claim at issue leaves a plaintiff with a cause of action that can be litigated only in federal court, ERISA preempts the forum as well as cause of action. Arguably, this simultaneous affect on forum and claim may deprive the state court of the power to adjudicate. *See International Longshoremen's Ass'n v. Davis,* 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986).

Notwithstanding the power of this set of ERISA provisions, a plaintiff might still rely on our decision today to bring our version of the claim for pension-related wrongful discharge in a state court. The plaintiff could purge ERISA from the face of the petition and rely on the well-pleaded complaint rule to deter removal of the case to federal court. *See Louisville & Nashville R.R. Co. v. Mottley,* 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). Under that rule, which states that a petition that describes only state claims on its face prevents removal by a defendant to federal court, a defendant would be left with nothing better than the dubious opportunity to convince a state court that the pertinent ERISA provisions deprive he state court of subject matter jurisdiction.

This procedural block to removal, however, no longer deters the ERISA § 502(a) defendant. In *Metropolitan*

Life Ins. Co. v. Taylor, 481 U.S. 58, 67, 107 S.Ct. 1542, 1548, 95 L.Ed.2d 55 (1987), the United States Supreme Court created an exception to the well-pleaded complaint rule in deciding that these defendants may remove. Furthermore, the fact that a state court has no jurisdiction over the claim to begin with, which once prohibited removal, restrains defendants no longer. 28 U.S.C. § 1441(e) (Supp. 1989). It is clear, therefore, that defendants faced with a petition that states no more than our new cause of action may remove to federal court, raise the defense of preemption, and replace the common law claim.

By creating today's exception to the employment at will doctrine, the court misleads employees by providing them with an imaginary claim. ERISA, on the other hand, provides them with a real and enforceable claim that they may bring in federal court and at the same time supersedes the claim manufactured today. I believe that ERISA's provisions make it doubtful that a state court even has power to adjudicate the new cause of action. In any case, astute defendants need not wait to find out. They need only remove to federal court and raise a defense of preemption. I sincerely regret the confusion and prolonged litigation we have thrust upon employers and employees in their efforts to resolve disputes concerning their pension plans.

II. SUMMARY JUDGMENT

An equally profound implication of the majority opinion concerns the availability of summary judgment proceedings in wrongful discharge cases. In its motion for summary judgment. the general supervisor for Ingersoll-Rand submitted a sworn affidavit stating that Mc-

Clendon's termination arose as part of a company-wide reduction of the workforce in response to adverse economic conditions. The response by McClendon noted that his termination occurred four months prior to the vesting of his pension, at which time the company would have been required to contribute $3000 to his employee pension fund. McClendon also relied on comments made by his supervisor, who stated his general satisfaction with McClendon's job performance. This evidence, according to the holding of the majority, is sufficient to raise a fact issue on whether the employer terminated the employee in part to escape contributions to the employee pension fund.

This holding, however, raises a question that remains unanswered: when will the evidence presented on motion for summary judgment be insufficient to raise an issue of fact on the employer's intent? The court today finds a fact question under the evidence presented in this case, a case in which the termination preceded the vesting of the benefits by four months; would a fact question also be raised when the termination preceded the vesting by five months or nine years and eleven months? The majority opinion unfortunately fails to provide trial courts and litigants with the answer to this crucial question. In the absence of an answer, an employee is presumably guaranteed a jury trial by merely alleging that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund.

This approach undercuts the very purpose of summary judgment proceedings, which are designed to eliminate patently unmeritorious claims and untenable defenses. *See*

In re Estate of Price, 375 S.W.2d 900, 904 (Tex. 1964). The provision for summary judgment proceedings serves the critical functions of eliminating baseless claims from congested trial dockets and saving the unwarranted expenses involved in trying such actions. This concern has likewise been recognized in the context of wrongful discharge actions brought pursuant to ERISA. For example, an employee must establish more than the mere fact that the termination of his employment resulted in a monetary savings to his employer; otherwise, an ERISA violation would occur every time an employer terminated a vested employee. *See Nixon v. Celotex Corp.*, 693 F.Supp. 547, 555 (W.D. Mich. 1988); *Donohue v. Custom Management Corp.*, 634 F.Supp. 1190, 1197 (W.D. Pa. 1986).

Herein lies the crux of my concern with the majority opinion. By permitting tort damages in actions based on the employer's desire to escape an obligation to contribute to pension funds and yet failing to deliniate those circumstances under which a summary judgment would be appropriate, the court has unduly chilled an employer's right to terminate an at-will employee with or without cause. No longer can the vast number of employers rely on a valid reason in terminating employees without a jury's scrutinization of their decisions and the possible imposition of tort damages. By terminating employees at any point prior to their retirement, employers need only wait for the court summons to explain and justify their decisions to a jury. The proverbial "floodgates of litigation" have never been a more appropriate concern than in the decision reached by this court today. For this reason, I strongly oppose the majority's decision to place unwarranted limitations on the employment-at-will doctrine.

III. BREACH OF GOOD FAITH AND FAIR DEALING

In his arguments presented to this court, McClendon seeks to hold Ingersoll-Rand to the duty of good faith and fair dealing in the context of their former employment relationship. Despite his characterization of this duty as an "implied covenant," which suggests an action sounding in contract, McClendon also seeks the recovery of tort damages such as mental anguish, emotional distress, and punitive damages. McClendon based his claim for tort damages on *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex. 1987), a case in which this court recognized a duty on the part of insurers to deal fairly and in good faith with their insureds. This duty arises from the special relationship that exists in the insurance context due to an unequal bargaining power between the parties and the special nature of such contracts. *Arnold*, 725 S.W.2d at 167. While implied covenants are contractual in nature, the duty of good faith and fair dealing is imposed by law in insurance relationships. *Chitsey v. National Lloyds Ins. Co.*, 738 S.W.2d 641, 643 n. 1 (Tex. 1987).

Employers, however, do not generally receive economic benefits by terminating productive employees and thus do not require disincentives to terminate employees in addition to those already imposed by law. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 396, 254 Cal. Rptr. 211, 234 (1988); Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 973-74 (1984) (hereinafter Epstein, *Contract at Will*). Further, employment relationships do not possess an inequality in bargaining power as a universal characteristic and thus cannot be analogized to insurance relationships on this

basis. *See* Epstein, *Contract at Will*, 51 U. CHI. L. REV. at 973-74; *see also* Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153, 165-67 (1981) (hereinafter Note, *Defining Torts*).

The employment relationship is also distinguishable on the basis of the duties owed by the respective parties under the contract. Employers, unlike insurers, do not owe similar fiduciary duties to their employees, who are themselves agents of the employers and are obligated to act in their employers' interests. *Foley*, 765 P.2d at 395, 254 Cal. Rptr. at 233, (citing Note, *Defining Torts*, 34 STAN. L. REV. at 165-67). The duties owed in an employment-at-will relationship are instead premised on the mutuality of obligations existing between the employee and employer, both of whom are able to terminate the relationship with or without cause. I would therefore decline to extend the duty articulated in *Arnold* and its imposition of tort damages to employment-at-will relationships. There should not be a tort cause of action for a breach of good faith and fair dealing in an employment-at-will relationship. I would thus follow the majority of jurisdictions that have not allowed the recovery of tort damages for a breach of the duty or implied covenant of good faith and fair dealing in at-will employment relationships.

Additionally, McClendon is not entitled to recover contract damages under an implied covenant of good faith and fair dealing in this case. According to McClendon, the company terminated his employment to avoid paying any commissions that he would have earned from future sales. The contractual right to these commissions was set forth in a written compensation agree-

ment, which expressly addressed the commissions to be earned by McClendon in the event that Ingersoll-Rand terminated his employment for any reason. McClendon has not alleged that the company owed any commissions that had already been earned under the terms of this agreement at the time of his termination. Instead, McClendon apparently seeks the recovery of commissions that would have eventually been earned from future sales.

McClendon and Ingersoll-Rand contemplated and expressly set forth the manner by which the commissions would have been earned in the event of a termination. Under the express terms of this agreement, the parties did not create a right on behalf of McClendon to earn potential commissions. Thus, the covenant of good faith and fair dealing cannot be implied in this instance to set aside the express terms of their agreement and permit McClendon's recovery of potential commissions. *See Willis v. Champlain Cable Corp.*, 109 Wash. 2d 747, 759, 748 P.2d 621, 627 (1988).

McClendon further alleges that Ingersoll-Rand terminated his employment in order to prevent the vesting of his retirement and pension benefits, thereby relieving the company of its required contribution to his pension fund. On motion for summary judgment, however, Ingersoll-Rand presented an uncontroverted affidavit stating that McClendon's benefits have in fact vested. Because McClendon has received his retirement and pension benefits, the trial court properly rendered summary judgment with respect to the recovery of these contractual benefits.

I would accordingly affirm the judgment of the court of appeals.

PHILLIPS, C.J., and HECHT, J., join in this dissent.

GONZALEZ, Justice, dissenting.

I join with Justice Cook's conclusions that this cause of action is preempted by ERISA, and that it will be very difficult, if not impossible, to filter out meritless cases by summary judgment as a result of today's opinion. I write, however, to emphasize what the court's decision does not do. It does not extend the duty of good faith and fair dealing to the employment-at-will doctrine; and it does not decide what damages are available for this new cause of action. I further note that the federal authority that the court finds persuasive is questionable.

By point of error, McClendon invited us to engraft the duty of good faith and fair dealing as enunciated in *Arnold v. National County Mutual Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) on to the employment-at-will doctrine.[1] We refused.

In responding to this point of error, the court instead created a narrow "exception to the employment-at-will doctrine." In creating this exception, the court fails to give the bench and bar clear guidance as to whether this "exception" creates a new cause of action sounding in tort or whether it merely eliminates the doctrine as a contractual defense. *See Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983); *see generally*, Annotation, *Discharge of At-Will Employees*, 12 A.L.R. 4th 544 (1982).

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1. We granted McClendon's application for writ of error on points two and four. Point four contended: "The Court of Appeals erred when it failed to recognize that a covenant of good faith and fair dealing should be applied to Respondent's employment relationship with Petitioner."

In an attempt to avoid the preemptive effect of ERISA, the court observes that the plaintiff here is "seeking lost future wages, mental anguish and punitive damages" as a result of the alleged wrongful discharge. P. 71 at n. 3. The court, however, does not resolve whether the plaintiff is entitled to all damages pleaded. This is essentially an open question. In *Azar Nut Co. v. Caille,* 734 S.W.2d 667 (Tex. 1987), we allowed punitive damages, but this was in a statutorily-created cause of action for which the right to exemplary damages could reasonably be inferred from the language of the statute. In *Sabine Pilot Service, Inc. v. Hauck,* 687 S.W.2d 733 (Tex. 1985), we recognized a common law exception but did not decide the question of available damages. *Id.* at 736 (Kilgarlin, J., concurring). As a general rule, the damages available for common law wrongful termination are contractual in nature. *Greater Fort Worth and Tarrant County Community Action Agency v. Mims,* 627 S.W.2d 149 (Tex. 1982).

Furthermore, the court's reliance upon two federal district court cases, *Hovey v. Lutheran Medical Center,* 516 F.Supp. 554 (E.D.N.Y. 1981) and *Savodnik v. Korvettes, Inc.,* 488 F.Supp. 822 (E.D.N.Y. 1980) is misplaced. Those two courts created a public policy exception to the employment-at-will doctrine that another New York federal district court refused to follow, stating:

> [A] change in New York's law such as the recognition of a tort which for the past 90 years has not been recognized by the New York Court of Appeals, should not be brought about by a federal district court deciding issues of state law solely by virtue of the diversity of citizenship of the parties before it (citatons omitted). [H]irings for an unspecified or

> indefinite period are freely terminable at the will of either party.

Salanger v. U.S. Air, 560 F.Supp. 202, 205 (N.D.N.Y. 1983). Additionally, one New York intermediate court of appeals considered and refused to follow the same cases the court now finds persuasive:

> We find no case in this state wherein a cause of action for abusive discharge based on a violation of public policy has been sustained and we are unable to subscribe to such a cause of action in light of the well-established principle that an at-will employee may be discharged at any time without cause.

Pavolini v. Bard Air Corp., 88 A.D.2d 714, 715, 451 N.Y.S.2d 288, 289 (1982). The highest court of the State of New York has declined opportunities to carve out exceptions to the employment-at-will doctrine. *See Weiner v. McGraw-Hill, Inc.,* 57 N.Y.2d 458, 443 N.E. 2d 441, 457 N.Y.S.2d 193 (1982); *Murphy v. American Home Products Corp.,* 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983); *see also Salanger,* 560 F. Supp. at 205; *Parowich v. Chemical Bank,* 98 A.D.2d 318, 470 N.Y.S.2d 599 (1984).

For the above reasons, I dissent.

Perry McCLENDON,
Appellant,

v.

INGERSOLL-RAND CO.,
Appellee.

No. C14-87-768-CV.

Court of Appeals of Texas,

Houston (14th Dist.).

July 21, 1988.

Rehearing Denied Aug. 18, 1988.

Before JUNELL, SEARS and CANNON, JJ.

OPINION

JUNELL, Justice.

This is a wrongful discharge case. Appellant Perry McClendon sued his former employer, Ingersoll-Rand Co., after he was released from his position as a salesman. He alleged that his employment contract was not terminable at will. He also alleged that appellee had breached an implied covenant of good faith and fair dealing, and that appellee intentionally inflicted emotional distress upon him. The trial court rendered summary judgment against appellant. We affirm.

Appellee had employed appellant for nine years and eight months at the time of the termination. Appellant stated in his petition that retirement benefits would have

vested to his benefit if he had continued in appellee's employ for four more months. Furthermore, he alleged that he had laid the ground work for a large transaction with Trinity Equipment, but that the wrongful discharge deprived him of commissions from that sale. In support of his claims that the employment relationship was not terminable at will, he points to a series of writings which govern the calculation of such commissions.

At the time of the termination (Nov. 19, 1982) appellant and his employer determined commissions by reference to a "Compensation Arrangement." Each year the employer promulgated guidelines in such a document which fixed the sales quota, expense budget, and commission schedules for all sales personnel. The parties disagree over whether the compensation arrangement limited their ability to end the relationship at will. Although it does not address the issue directly, the 1982 version of the "arrangement" provides in part:

> TERMINATIONS
>
> When the employment by I-R of a commissioned Distributor Representative terminates for any reason before the equipment on which he has been recommended for commission has been invoiced, he is to be paid one-half (1/2) commission on the sales credit when the equipment is invoiced. In the determination of commission payable under this paragraph, only firm orders on which the commissioned Distributor Representative is recommended for commission and which are received up to the close of the last full working day of the Distributor Representative's actual employment shall be included, provided such orders are accepted by the Company. Any monthly commission on Rental Equipment ceases at the time of termination. Only equipment invoiced

within ninety (90) days from termination date will qualify for commission.

From the effective date of termination there will be a thirty (30) day period in which the Distributor Representative will be required to furnish I-R with all commissionable sales due him. No commission request beyond this thirty (30) day period will be honored.

The Special Commission Schedule for attaining quotas does not apply if termination occurs prior to the end of the calendar year.

The document ends by noting that it is subject to change by appellee at any time, and that in any event it expires at the end of 1982. Appellant signed the document, as did a representative of appellee.

The first point of error asserts that the written compensation agreement barred application of the "at will" employment doctrine. The at will rule, as usually formulated, allows either party to an employment relationship to dissolve that relationship at any time and for any reason (or no reason at all). This customary statement of the rule constitutes a serious misrepresentation of the law, however, because employers must abide by a host of restrictions on their discretion.

[1-3] Federal legislation prohibits the firing of an employee for reasons of race, color, religion, sex, or national origin. Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). Federal law likewise bars arbitrary discharge based on age. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623. The Texas Commission on Human Rights Act echoes these restrictions and additionally outlaws discharge based on handicap.

TEX. REV. CIV. STAT. art. 5221k § 5.01. Retaliatory discharge is illegal in a number of circumstances. *See, e.g.*. Judiciary and Judicial Procedure Act, 28 U.S.C. § 1875 (jury service); National Labor Relations Act, 29 U.S.C. § 158 (union activity); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660 (reporting workplace hazards); TEX. REV. CIV. STAT. art. 8307c (filing a worker's compensation claim); *see generally* Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 Baylor L. Rev. 667, 669-70 (1984) (listing other statutory limits).

[4] Texas common law similarly curtails an employer's ability to terminate an employee when the sole reason for termination is the employee's refusal to commit an illegal act. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W. 2d 733 (Tex. 1985).

[5] However, appellant rests his argument not on statutory or common law bases, but on the compensation arrangement. Ingersoll-Rand convinced the trial court that the written document merely stated company policy in the area of sales commissions, and we agree. That the writing calls itself an agreement is in no way a hindrance to dissolution of the employment relation. Indeed, the document's termination paragraphs plainly contemplate that termination may occur at any time. Our conclusion is bolstered by the provision that the "agreement is subject to change, at any time. by the Company without prior written notice."

Appellant relies on *Benoit v .Polysar Gulf Coast, Inc.*, 728 S.W.2d 403 (Tex. App.—Beaumont 1987, writ ref'd, n.r.e.) for the proposition that an employer's right to terminate an employee is limited when a writing so pro-

vides *"in a meaningful and special way." Id.* at 406 (emphases in original). Rather than engage in a semantic dispute over what the Beaumont Court meant, we regard the quoted phrase simply as a rhetorical flourish on the more pedestrian expression of the rule in the case it cited, *Webber v. M.W. Kellogg Co.*, 720 S.W.2d 124, 127 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). *Webber* states that employment is at will absent a writing which "specifically" says otherwise. The writing at hand merely regulates sales commissions. Point of error one is overruled.

[6] Point of error two claims that the compensation agreement is ambiguous. Although appellant maintains in his reply brief that he raised this argument below, his response to the motion for summary judgment contains no mention of ambiguity. The only conceivable reference to ambiguity appears in the response at paragraph VI, entitled "Burden of Proof." That paragraph reminds the court that Ingersoll-Rand assumes the burden of proof on all elements of its cause of action, including a showing that the "provision in question is capable of only one meaning or interpretation." The next and final sentence states that "Defendants have not met this burden, and Defendants' Motion for Summary Judgment must be denied."

This passing comment does not meet the requirement that a response *expressly present* the issue to the trial court. TEX. R. CIV. P. 166a(c); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671 (Tex. 1979). On the contrary, this is no more than a challenge to the legal sufficiency of the movant's proof, a challenge which is available on appeal in any event, regardless of whether a response has been filed. Appellant's third point of error

raises just such a challenge. We overrule the second point of error.

[7] The third point of error asserts that fact issues exist concerning interpretation of the compensation agreement. We glean no such fact issues from either of the depositions on file; neither does the instrument itself admit of any interpretation even remotely supportive of appellant's position. The third point of error is overruled.

[8] In his fourth point of error, appellant contends that he substantially performed in regard to the Trinity Equipment deal. This contention does not appear in his response to the motion for summary judgment, although Trinity Equipment is mentioned in paragraph III, entitled "Plaintiff Was Terminated Without Good Cause." (We will address the good cause issue in due course). Appellant's reference to the Trinity Equipment deal can only be read as fortifying his argument that good cause was lacking. Rule 166a(c) does not permit presentation of the substantial performance argument on appeal. We over- the fourth point of error.

[9] Point of error five squarely raises the question whether the parties incorporated a good cause limitation onto Ingersoll-Rand's otherwise unfettered discretion to terminate the relationship. Appellant presented this issue below, despite appellee's claims to the contrary, in paragraph III of his response. Appellant characterizes his employment relationship as containing an "implied in fact" agreement that he not be released except for good cause. This he calls an exception to the at will rule. As evidence of this limitation he points out that he relocated himself and his family to Dallas, implicitly relying on Ingersoll-Rand's willingness to continue his employment.

As to the existence of an implied in fact agreement, both sides' arguments cast more heat than light. The question is not whether such an "exception" in the contract is real or illusory; rather the question is simply, what is the scope of the contract? The contract of employment was never reduced to writing, contained no specification of duration and lacked any limitation on the parties' abilities to go their separate ways. Ingersoll-Rand presented affidavit testimony which corroborates our reading of the compensation agreement. Accordingly, the common law rule applies. *See East Line & R.R. Ry. Co. v. Scott,* 72 Tex. 70, 10 S.W. 99 (1888). The fifth point of error is overruled.

[10] In point of error six appellant asks us to create an implied covenant of good faith and fair dealing. The starting point in our analysis is Supreme Court precedent. As recently as five years ago the Supreme Court expressly rejected an invitation to recognize such a rule. *English v. Fischer,* 660 S.W.2d 521, 522 (Tex. 1983). Appellant regards *English,* however, as incapable of survival without extraordinary means, in view of *Arnold v. National County Mut. Fire Ins. Co.,* 725 S.W.2d 165 (Tex. 1987). In the latter case the Court imposed such a convenant on insurers because of a special relationship between insurers and their insureds. Nevertheless, *Arnold* furnishes us no warrant for renouncing a binding precedent and fashioning a new rule to the contrary.

If we were to recognize the employer-employee relationship as "special," that would be tantamount to putting every commercial contract under the umbrella of *Arnold:* vendor-purchaser, lessor-lessee, lender-borrower. Such an extension would undermine the very foundation of *Arnold*

by denying that an insurance relationship is deserving of any special protection: it would in effect repudiate the Court's rationale to confuse the exceptional with the everyday.

[11] Furthermore, the Supreme Court has gone on record as disapproving encumbrances on free movement in the workplace. *See Bergman v. Norris of Houston,* 734 S.W.2d 673 (Tex. 1987); *Hill v. Mobile Auto Trim, Inc.,* 725 S.W.2d 168 (Tex. 1987), An employee is as free to leave the relationship as an employer in a competitive environment: "it is but a normal effect of a free market economy." *Hill v. Mobile,* at 172. *See also* Tex. Const. art. I, § 26.

Finally, as discussed earlier, there is no want of legislation which restricts an employer's ability to dissolve an employment contract. It would be impertinent for us to arrogate to ourselves the right to pass additional laws under the guise of deciding cases. TEX. CONST. art. II, § 1. As Chief Justice Guittard said in a wrongful discharge case virtually identical to this one, "In our system of constitutional government, the primary agency to declare the policy of the state is the legislature. Although legislative processes may be imperfect, appeals for judicial legislation based on legislative inaction betray a loss of faith in democratic government." *Watson v. Zep Mfg. Co.,* 582 S.W.2d 178, 180 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); *accord Molder v. Southwestern Bell Tel. Co.,* 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) ("the legislature is the appropriate agency for effecting a change in policy regarding the employer-employee relationship."). To say that the at will doctrine—a misnomer to begin with—was judicially

created and can therefore be judicially abolished is to misstate history. The at will doctrine was not generated *ex nihilo* in 1888 against a backdrop of some contrary legal regime. *See* Tex. Civ. Prac. & Rem. Code § 5.001 (adopting the common law of England as the rule of decision when no local source can be found); Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship,* 36 Baylor L. Rev. 667, 667-68 (1984) (tracing the history of the rule back to England). The sixth point of error is overruled.

[12] The final point of error assigns error to the adverse summary judgment on appellant's claim of intentional infliction of emotional distress. The summary judgment proof establishes beyond dispute that the discharge of appellant was neither extreme nor outrageous. (Indeed, appellant incorrectly concluded that being discharged before ten years of service would prevent him from collecting certain benefits. He was in fact never denied those benefits). Ingersoll-Rand did nothing more than react to an economic downturn by reducing its sales force. Such conduct is in no way actionable. The seventh point of error is overruled.

The judgment is affirmed.

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No. 89-1298

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY MCCLENDON,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Texas

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the Chamber of Commerce of the United States of America ("the Chamber") hereby moves for leave to file the attached brief amicus curiae in support of the Petition for Writ of Certiorari. Petitioner Ingersoll-Rand Company has consented to the filing of the brief. Respondent Perry McClendon has denied consent.

1. The Chamber of Commerce of the United States of America is the largest federation of business companies

and associations in the world, representing nearly 180,000 members and serving as the principal voice of the American business community. Our members have expended billions of dollars on pension plans since Congress enacted the Employee Retirement Income Security Act of 1974 ("ERISA") and employ thousands of employees who stand to benefit from such plans. We have a strong interest in cases such as this, which represent a direct threat to the integrity of employee benefit plans across the nation.

2. Pursuant to Rule 37.1 of the Rules of the Court, the Chamber moves to file its brief amicus curiae to bring "relevant matter[s] to the attention of the Court that [have] not already been brought to its attention by the parties" that strongly support exercise of the Court's jurisdiction. Our brief highlights the following issues, in addition to the matters addressed in detail in the Petition.

3. First, our brief highlights the vital need to preserve ERISA's comprehensive and uniform regulation of pension plans from state interference. The decision below, recognizing a state wrongful discharge "public policy" tort for interference with pension benefits, directly conflicts with Congress' decisions to prohibit such discharges under ERISA and to confine litigation concerning such discharges to the federal courts. Congress made a careful and deliberate choice to limit the remedies available in ERISA, *see Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), and this choice serves to preclude additional state remedies, *see Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). The legislative history of ERISA reveals that Congress struck a balance between protecting employee rights and keeping employer costs within reasonable limits, to avoid discouraging the creation of pension plans. Congress also vested exclusive jurisdiction over claims alleging interference with pension rights in the federal courts. This unusual choice of an exclusive federal forum insulates ERISA discharge claims from state interference to the maximum extent possible, by removing altogether the power of state courts to hear such claims. The Court should exercise its jurisdiction in this case to preserve Congress' deliberate decisions to limit ERISA-related liabilities and to preclude states from exercising jurisdiction over claims that Congress intended to be heard only in the federal courts.

4. Second, our brief argues that if states are allowed to recognize the public policy tort of wrongful discharge for interference with pension benefits, our members will be subject to significant state liabilities for compensatory and punitive damages that Congress did not include in ERISA's comprehensive enforcement scheme. Our brief highlights the particular danger posed by the "public policy" tort of wrongful discharge to ERISA's exclusive statutory and remedial scheme, by bringing to the Court's attention factual and legal materials not previously cited in connection with this case. As our brief establishes, thirty-nine states now recognize tort claims for wrongful discharge in violation of "public policy." Thousands of such claims have been filed across the country, resulting in six- and seven-figure awards for compensatory and punitive damages. The decision below therefore confronts employers who maintain federally controlled pension plans with the prospect of significant state-imposed liabilities that Congress did not envision when it enacted ERISA, and that employers could not have foreseen when they chose to institute their plans. Moreover, the concomitant growth in private pension plans since the passage of ERISA, also documented in our brief, creates a huge number of potential state court tort plaintiffs, who may well elect to litigate in state rather than federal court if presented with a choice between the limited equitable relief authorized by Congress and large compensatory and punitive damage awards available under state law.

5. Finally, our brief argues that the Court's immediate attention is necessary because a dangerous precedent for

avoiding federal preemption will be established if the decision below is left undisturbed. According to the reasoning of the Supreme Court of Texas, federal preemption does not apply because the tort claim it recognized provides for different, more expansive remedies than ERISA. This "supplemental remedies" theory for avoiding federal preemption conflicts with a line of decisions by the Court, exemplified by *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282 (1986), and poses a dangerous threat to the integrity of numerous federal remedial schemes that Congress intended to be exclusive.

In order to bring these matters to the attention of the Court, the Chamber respectfully moves for leave to file the attached brief in support of the Petition for Writ of Certiorari.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

INTEREST OF THE AMICUS CURIAE

1. The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents nearly 180,000 businesses and organizations and serves as the principal voice of the American business community.

2. The Chamber's members have a vital interest in preserving the uniform and exclusive federal regulation of penison plans intended by Congress when it passed the

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"). Our members have expended billions of dollars on pension plans governed by ERISA's intricate statutory scheme and employ thousands of individuals who stand to benefit from such plans. The threat to the interests of our members from the decision of the Supreme Court of Texas is national in scope. If states are allowed to recognize a "public policy" tort of wrongful discharge for interference with pension benefits, on the basis of a federal statute, the many thousands of employees across the country who are close to vesting in their pension rights and are terminated in the normal course of business will become potential state court tort plaintiffs. As a result, those of our members maintaining ERISA plans will find themselves subject to a significant liability that did not exist when they decided to begin such plans—awards of compensatory and punitive damages under state law.

3. Such liability directly conflicts with Congress' deliberate decisions, embodied in ERISA's express language, to prohibit the very conduct that Texas now finds contrary to its public policy, and to create an exclusive federal remedy for enforcing that federal prohibition. As part of ERISA's comprehensive federal regulation of virtually all aspects of employee benefit plans, Congress specifically prohibited the discharge of an employee for the purpose of interfering with the attainment of any benefit or right to which the employee may become entitled under a covered plan.[1] Congress further provided that claims under this section of the statute would be heard exclusively in the federal courts, and that such

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[1] Section 510 of ERISA, 29 U.S.C. § 1140, provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the [employee benefit] plan.

claims could be remedied only through the entry of injunctive or other appropriate equitable relief.[2]

4. This congressional decision to exclude state courts from ERISA enforcement is part and parcel of Congress' broader purpose of replacing haphazard state regulation with a uniform set of national rules, and thereby to encourage the formation and maintenance of ERISA plans. It was for this reason that Congress broadly preempted any and all state laws "insofar as they may now or hereafter relate to" any covered benefit plan.[3] As a result, those of our members deciding whether to create pension plans and those who deal on a daily basis with the intricacies of administering such plans have been guaranteed a defined, uniform, and exclusive set of applicable national rules.

5. The decision below compels the Court's attention because it poses an especially daunting threat of interference with the uniform legal framework established by ERISA. In the past decade, the proliferation of wrong-

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[2] Section 502(e) of ERISA, 29 U.S.C. § 1132(e), provides for exclusive federal jurisdiction over ERISA discharge claims as follows:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary.

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), provides for relief in ERISA discharge cases as follows:

> A civil action may be brought—
>
> . . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

[3] 29 U.S.C. § 1144(a).

ful discharge claims proceeded at an astounding rate, subjecting employers to previously unrecognized causes of action. At least thirty-nine states now recognize a cause of action for wrongful discharge in violation of "public policy."[4] Thousands of such lawsuits have been filed across the country, resulting in six- and seven-figure awards for compensatory and punitive damages.[5] A similar proliferation of ERISA pension plans has occurred since Congress enacted ERISA, creating an ever larger universe of potential state law wrongful discharge plaintiffs who are about to vest in their pension rights.[6] The aging of the so-called "baby boom" generation, resulting in a greater percentage of individuals at retirement age, will soon put the financial stability of pension plans to its most stringent test.

Our members therefore have an obvious and growing interest in ensuring that the uniform and exclusive federal rules relating to employee pension benefits remains free from state interference, and that congressional decisions regarding the liability of employers in connection with such plans be preserved from contrary state judgments.

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[4] *See* "Employment-At-Will State Rulings Chart," I.E.R.M. (BNA), at 505:51 (1989).

[5] One research firm has determined that the national average damage award in cases based on wrongful termination rose from $227,280 in 1986 to $311,332 in 1987. *See* "See You In Court," Nation's Bus., July 1989, at 17. Columbia University professor Alan F. Westin has estimated that some 25,000 wrongful discharge cases were pending in federal and state courts in 1987. *See* "It's Getting Harder to Pass Out Pink Slips," Bus. Wk., March 28, 1988, at 68.

[6] According to the most recent Department of Labor data, employers in 1987 maintained some 872,000 private pension plans, covering 41.9 million workers. *See* Pension and Welfare Benefits Administration, U.S. Department of Labor, "Trends in Pensions" 13, Table 1.3 (1989).

SUMMARY OF ARGUMENT

1. Exercise of the Court's jurisdiction is necessary to preserve the complex, uniform and comprehensive statutory scheme created in ERISA from state interference. Designed to ensure the soundness and stability of covered employee benefit plans, ERISA establishes uniform national rules to govern comprehensively such plans. One of the most complex and reticulated statutes ever adopted, ERISA broadly regulates employee benefit plans from formation to dissolution by establishing detailed requirements governing, *inter alia*, vesting of benefits, disclosure and reporting of plan financial information, the responsibilities and obligations of plan fiduciaries, standards of funding, rights of participants and employees, and plan termination.

2. Congress, when it created this complex federal code, determined that uniform and exclusive federal regulation of benefit plans was required. Congress codified this decision broadly to preempt all state laws relating to benefit plans in an express preemption provision that serves as a fundamental part of the statutory scheme created in ERISA. The Court repeatedly has recognized, in a line of cases beginning with *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), that Congress deliberately adopted ERISA's broad express preemption provision in order to ensure that an exclusive set of federal rules governs the complex area of employee benefit plans.

3. This broad preemption provision, which voids all state laws "insofar as they may now or hereafter relate to" any covered benefit plan,[7] precludes Texas' effort to supplement federal remedies for a wrong already recognized in the text of ERISA. Not only did Congress make it unlawful under federal law to discharge an employee to avoid payment of pension benefits; Congress chose to provide only equitable relief for such violations, and to in-

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[7] 29 U.S.C. § 1144(a).

sulate such discharge claims from any state interference to the maximum extent possible by vesting exclusive jurisdiction over ERISA discharge claims in the federal courts. The Court repeatedly has preserved the integrity of ERISA's exclusive federal remedial scheme, and specifically has held that state tort claims remediable through compensatory and punitive damages are inconsistent with the detailed federal remedial scheme created in ERISA.

4. It is no answer to say that Texas merely is adding a sanction to conduct already prohibited by federal law. In a line of cases exemplified by *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282 (1986), the Court uniformly has rejected the notion that the states are free to add remedies where Congress has prohibited conduct under federal law and created an exclusive federal statutory remedy. The states are not free to determine that Congress has created insufficient remedies to vindicate federal interests. This is especially true where, as here, the congressional choice of remedy is part of an integrated remedial scheme deliberately designed to balance competing interests of employers and plan participants, and Congress has provided exclusive federal court jurisdiction for enforcement of the federal rights in question.

5. Unless the decision below is reversed, state courts will be free to rely upon federal law as a basis for state "public policy," and thus to create new remedies where Congress already has decided to preclude the states from enforcing these federal interests. While this case presents an extreme example of state interference in an area deliberately and expressly closed to state regulation, there are numerous other fields of federal interest in which Congress has created an uniform code of conduct, complete with exclusive federal statutory remedies. If Texas can act here, in the face of ERISA's express preemption provision, other state courts will feel no constraints when faced with federal statutes that do not expressly preempt state law, but where Congress nonetheless intended to preserve federal uniformity. The dangerous precedent that would be created by allowing state adjudication in the face of ERISA's express preemption provision cannot be overstated and deserves the Court's immediate attention.

ARGUMENT

I. EXERCISE OF THE COURT'S JURISDICTION IS REQUIRED TO ENSURE THE PREEMPTION OF ALL STATE LAWS RELATING TO EMPLOYEE BENEFIT PLANS, AS EXPRESSLY INTENDED BY CONGRESS.

We will not address the decisional conflict created by the decision below and discussed at length by Petitioner. *See* Petition for Writ of Certiorari to the Supreme Court of Texas, at 9-13. While this conflict in itself justifies granting the Petition, in our view there are several additional and equally important reasons for the Court to consider this case on the merits.

First, the Court's immediate attention is necessary to preserve the federal statutory scheme embodied in ERISA from state intrusion. The decision below conflicts with a deliberate, careful and unequivocal congressional choice to preempt state law in this field. The express preemption provision enacted by Congress in Section 514 of ERISA is one of the clearest and broadest preemption provisions contained in federal law. Using unequivocal language, Congress provided that "the provisions of [ERISA] . . . supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the statute.[8]

The Court repeatedly has emphasized that this language, and the legislative history of ERISA, demonstrate that Congress made a deliberate decision to "establish pension plan regulation as exclusively a federal concern." *Alessi*,

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[8] 29 U.S.C. § 1144(a).

451 U.S., at 523. As the Court explained in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983):

> The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected those provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language. See H.R. Conf. Rep. No. 93-1280, p. 383 (1974); S. Conf. Rep. No. 93-1090, p. 383 (1974).

In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987), the Court noted that "the House and Senate sponsors emphasized both the breadth and importance of the pre-emption provisions." Indeed, the Court quoted from one sponsor of the act who characterized the "'reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans' as ERISA's 'crowning achievement.'" *Id.* (quoting 120 Cong. Rec. 29197 (1974)). Petitioner thus asks the Court to enforce a preemption provision that was deliberately included in the explicit language of ERISA because Congress itself deemed it fundamental to the complex statutory scheme being created.

The Court repeatedly has struck down state attempts to infringe on this area of exclusive federal interest, recognizing the "expansive sweep of [ERISA's] preemption clause" and giving it a "broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Pilot Life Ins. Co.*, 481 U.S., at 47 (citations omitted). For example, in *Alessi*, 451 U.S., at 522-25, the Court held that ERISA preempted a New Jersey law prohibiting workers' compensation benefits from being used to offset pension benefits because the state law "relates to" pension plans.[9] Two years later, in

[9] Significantly, the state law preempted in *Alessi* at least served the principal purpose of regulating workers' compensation calculations. The wrongful discharge action recognized by the court below, by contrast, expressly vindicates the federal interest in protecting ERISA benefits, and thus even more closely "relates to" pension benefits than the state law struck down in *Alessi*.

Shaw, 463 U.S., at 96, the Court had "no difficulty in concluding that" ERISA preempted a New York Human Rights Law forbidding discrimination in employee benefit plans on the basis of pregnancy because it "'relate[s]' to employee benefit plans."[10]

These preemption principles have been applied directly to the congressional choice of remedies implicated in this case. In *Pilot Life Ins. Co.*, 481 U.S., at 47-48, the Court held that Section 514 of ERISA preempted three state tort claims—for tortious breach of contract, breach of fiduciary duties and fraud in the inducement—alleging a failure to provide benefits under a long term disability employee benefit insurance plan. In holding that these state causes of action were not saved by the insurance exception to ERISA preemption, the Court explicitly emphasized that ERISA's comprehensive civil enforcement scheme "is one of the essential tools for accomplishing the stated purposes of ERISA" and functions as "the exclusive vehicle" for protecting ERISA rights. 481 U.S., at 52. Leaving no doubt that states could not impose supplemental remedies relating to conduct prohibited by ERISA, the Court stated:

> [T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and

[10] The sex discrimination prohibited by the New York law at issue in *Shaw* is not even specifically prohibited by ERISA, which contains no prohibition against sex discrimination in benefit plans. Despite this "hole" in ERISA's regulatory scheme, the Court held that the state law was preempted. In this case the federal-state conflict is even clearer, because ERISA expressly prohibits discharge for the purpose of interfering with pension benefits, provides a defined set of limited remedies, and gives federal courts exclusive jurisdiction over such claims.

> fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. *The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.*

Id. at 54 (emphasis added).[11]

Congress' deliberate decisions to make it unlawful for employers to discharge employees to avoid the payment of pension benefits, and to specify that violations of this section of the statute were to be remedied through equitable as opposed to legal relief, are precisely the choices that the decision below intrudes upon. As the Court observed in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985), an earlier version of ERISA contained authorization for the entry of legal and equitable relief, but this language was eliminated when the act passed. The Court further observed:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress

[11] The importance of maintaining the integrity of ERISA's remedial scheme is illustrated further by the Court's recent decision in *Guidry v. Sheet Metal Workers National Pension Fund*, —— U.S. ——, 110 S. Ct. 680 (1990) (concluding that a constructive trust, imposed on pension benefits as a remedy for a violation of the Landrum-Griffin Act, contravened ERISA's non-alienation clause). While this case concerns employer liability rather than the rights of plan participants, the essential question in both *Guidry* and this case is the same; preservation of the integrity of ERISA's statutory scheme. *See also FMC Corp. v. Holliday, cert. granted*, —— U.S. ——, 58 U.S.L.W. 3526 (U.S. Feb. 20, 1990) (No. 89-1048) (dealing with the scope of the insurance exemption to federal preemption, and reinforcing the Court's interest in the interrelationship between ERISA and state law). Of course, resolution of the narrow issue presented in *FMC Corp.* regarding the so-called "deemer clause" would not resolve the vital issues presented in this case.

> did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361, 100 S. Ct. 1723, 1726, 64 L.Ed.2d 354 (1980).

Id. at 147 (emphasis in original).

The ERISA remedial scheme is part and parcel of a delicate balance between the interests of employers, labor organizations and plan participants, undertaken with full knowledge that imposition of excessive costs upon employers would discourage the formation of new retirement plans. *See Massachusetts Mutual Life Ins. Co.*, 473 U.S., at 148 n.17, and legislative history there cited. As Senator Nelson stated during floor debate on the Conference Report on the bill that eventually was enacted:

> [Costs are] an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, . . . Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.

102 Cong. Rec. S15,762 (daily ed. Aug. 22, 1974). *See also Pilot Life Ins. Co.*, 481 U.S., at 52 (ERISA's "comprehensive civil enforcement scheme . . . represents a careful balancing of the need for prompt and fair claims settlement procedure against the public interest in encouraging the formation of employee benefit plans").

In our view, as in *Pilot Life*, exercise of the Court's jurisdiction and reversal of the decision below therefore is necessary to preserve the balance struck by Congress and to protect "the clear expression of congressional in-

tent that ERISA's civil enforcement scheme be exclusive." *Id.* at 57.

Indeed, preemption in this case does not rest solely upon a congressional choice of an equitable remedy; Congress additionally vested exclusive jurisdiction over ERISA discharge claims in the federal courts.[12] Congress' creation of exclusive federal jurisdiction is unusual in our federal system, where state and federal courts generally share concurrent jurisdiction over federal claims. It is only where concurrent state jurisdiction is "excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case" that the courts will find exclusive federal jurisdiction. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 508 (1962); *see also Tafflin v. Levitt*, —— U.S. ——, 110 S. Ct. 792 (1990)

Congress' unusual choice of an exclusive federal forum, as part of an enforcement scheme that insulates ERISA-related discharge claims from any substantive state interference, would be rendered a nullity if the decision below is allowed to stand. Any plaintiff could evade Congress' explicit choice of an exclusive federal forum (and its decision to allow only equitable relief) merely by labeling his or her discharge claim as a violation of state "public policy."[13] A state court that would not even have jurisdiction over the same claim, based upon exactly the same facts and exactly the same federal policy if pleaded under ERISA, would be empowered by artful pleading to award compensatory and punitive damages far in excess of the relief contemplated by Congress when it created ERISA. We believe the Court should entertain this matter on the merits in order to

[12] *See supra*, note 2.

[13] As described by the English courts more than 150 years ago, public policy "is a very unruly horse, and . . . once you get astride it you never know where it will carry you." *Richardson v. Mellish*, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824).

avoid this anomalous result and protect Congress' explicit choice of exclusive federal enforcement of ERISA claims.

II. THE DECISION BELOW CONSTITUTES A DANGEROUS PRECEDENT FOR AVOIDING PREEMPTION AND DESTROYING THE SUPREMACY OF FEDERAL LAW.

According to the decision rendered by the Supreme Court of Texas, ERISA's express preemption provision does not preclude a wrongful discharge claim alleging interference with pension benefits because the respondent "is *not* seeking lost *pension benefits* but is instead seeking lost future wages, mental anguish and punitive damages as a result of the wrongful discharge." *McClendon v. Ingersoll-Rand Company*, —— Tex. ——, 779 S.W.2d 69, 71 n.3 (1989) (emphasis in original).[14] This "supplemental remedies" theory for avoiding federal preemption may be restated as follows: because the state provides more expansive remedies in order to vindicate federal interests, there is no federal-state conflict and federal preemption does not apply. This reasoning assumes that the same Congress that was far-sighted enough to create the important federal law in question was incompetent to ensure adequate protection of the federal rights it created, and that state judgments as to appropriate remedies should be substituted for congressional decisions as to how

[14] Congress created only two generic exceptions to the broad reach of ERISA preemption, neither of which is applicable to this case. First, Congress provided that the express preemption provision should not "be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). Second, the preemption provision does not apply "to any generally applicable criminal law of a State." 29 U.S.C. § 1144(b)(4). Significantly, Congress created neither a general exception allowing states to protect pension rights nor a specific exception allowing them to prohibit discharges intended to interfere with the attainment of such rights.

federal interests should be protected.[15] The Court never has embraced such an illogical assumption. In fact, well-established precedent of the Court establishes that a deliberate congressional choice of an exclusive federal remedy cannot be supplanted by the states.

The Court most recently held that states may not provide supplemental state remedies for conduct prohibited by a preemptive federal regulatory scheme in *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286-87 (1986). In *Gould*, the state of Wisconsin prohibited state procurement officials from purchasing any product from a firm or person found to have violated the National Labor Relations Act ("NLRA") in three separate cases within the preceding five years. The Court in *Gould* rejected precisely the theory espoused by the court below; that the state statute was not preempted because it merely provided supplemental penalties for violations of federal law. The Court reasoned that " 'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity,' " *id.* at 286 (quoting *Garner v. Teamsters*, 346 U.S. 485, 498-99 (1953)), and that the Wisconsin statute would interfere with Congress' " 'integrated scheme of regulation' by adding a remedy to those prescribed by the NLRA," *id.* at 287 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). The Court expressly rejected Wisconsin's argument that its "supplemental remedy" was "different in kind from those that may be ordered by the Board" because " 'to allow the State to grant a remedy . . . which

[15] The manifest disregard for deliberate federal judgments revealed by the decision below is perhaps best appreciated by considering the constitutionality of a state law authorizing state courts to entertain ERISA discharge suits, and to award compensatory and punitive damages, expressly premised on the state's conclusion that Congress had not gone far enough in protecting the rights of employees when it enacted ERISA. The unconstitutionality of such a law is manifest, and there is no meaningful distinction between the decision below and such a statute.

has been withheld from the National Labor Relations Board only accentuates the danger of conflict.' " *Id.* (quoting *Garmon*, 359 U.S., at 247).[16]

The potential disruption likely to arise from application of the "supplemental remedies" theory in cases such as this cannot be overstated.[17] The integrity of numerous federal regulatory schemes that Congress intended to have preemptive force would be destroyed if states are allowed to supplement federal remedies, despite congressional determinations concerning appropriate remedies and enforcement mechanisms.

[16] In *Garmon*, the Court held that a state could not provide tort damages for picketing prohibited by the NLRA. The Court rejected the argument that preemption did not apply because California was attempting to provide a different remedy, damages, in addition to the injunction that the Board can obtain. The Court squarely stated:

> Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme . . . .

Garmon, 359 U.S., at 247. The NLRA does not contain any express preemption language. The principle enunciated in *Gould* and *Garmon* is even more appropriate where, as here, it rests upon a preemption clause phrased in the broadest and most expansive language.

[17] The issue involved in *English v. General Electric Co., cert. granted*, —— U.S. ——, 110 S. Ct. 862 (Jan. 22, 1990) (No. 89-152) —whether the whistleblower protection contained in Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851, preempts state tort claims for wrongful discharge and intentional infliction of emotional distress—does not address directly the right of a state court to rely upon federal law as a basis for state public policy, nor does it involve a deliberate congressional choice of remedies insofar as compensatory damages are available for a violation of federal law in that case. *See, e.g., English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988) (federal claim for retaliatory harassment, arising from same incident as state tort suit, remanded to Secretary of Labor for reconsideration; compensatory damages held available in federal proceeding). The ability of a state to rely upon federal law as a basis for state public policy, and thus to add remedies to an inte-

Congress is wholly competent not only to create federal rights, but to provide an exclusive statutory scheme for their vindication. When it has done so expressly, as it has in ERISA, state courts have no business deciding, under a "public policy" rubric, that Congress has not gone far enough in protecting federal interests. The decision below constitutes such a fundamental threat to the principle of federal supremacy that the Court should step in, as it historically has done, to protect the deliberate decisions of Congress from state interdiction.

III. ALLOWING TORT CLAIMS FOR WRONGFUL DISCHARGE IN VIOLATION OF THE PUBLIC POLICY PROTECTING PENSION RIGHTS POSES AN ESPECIALLY SIGNIFICANT THREAT TO THE UNIFORM REGULATION OF PENSION PLANS, NECESSITATING THE COURT'S IMMEDIATE ATTENTION.

In the days when states across the country uniformly applied the employment at will doctrine, the decision of the Supreme Court of Texas could be viewed as an isolated anomaly that did not pose a significant nationwide threat to the uniform pension regulation established by ERISA. The past decade, however, has seen the steady erosion of the employment at will doctrine and an explosion in the number of claims alleging wrongful discharge in violation of public policy. As matters now stand, at least thirty-nine states recognize a cause of action for wrongful discharge in violation of public policy.[18] Thousands of such claims have been filed across the country, seeking millions of dollars in compensatory and punitive damages. Large

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grated federal remedial scheme that Congress deliberately intended to serve as the exclusive avenue for obtaining relief need not be resolved in *English, cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (Atomic Energy Act does not preempt state tort suit), and is an issue of sufficient moment, for the reasons explained above, to justify the Court's immediate attention.

[18] *See supra*, note 4.

awards in wrongful discharge cases have become commonplace.[19] By one estimate, average awards in successful California wrongful discharge actions run as high as $486,812.[20] Juries have awarded as much as $20 million to single individuals in wrongful discharge cases.[21]

Against this backdrop of the staggering increase in tort liability for wrongful discharge, the decision below poses an especially significant threat to the limited equitable remedies and exclusively federal remedial scheme created by Congress in ERISA. If the decision below is left undisturbed, thousands of employers who decided to create ERISA covered pension plans in reliance on ERISA's exclusive regulatory scheme will find themselves subject to vastly increased liabilities for compensatory and punitive damages unanticipated when they decided to maintain such plans. The careful balance that Congress struck in defining ERISA liabilities would be fundamentally altered on into the future as well, as employers would face the uncertain prospects of new state-imposed liabilities for maintaining federally controlled pension plans.

Compounding these problems, the number of individuals who are about to vest in their pension rights is ever increasing. Thousands of private pension plans have been created, and more and more employees vest in their rights each year.[22] Significantly, our population will soon

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[19] *See supra*, note 5.

[20] Jung & Harkness, "The Facts of Wrongful Discharge," 4 Lab. Law. 257 (1988). Other estimates are even higher. An article appearing in the Los Angeles Times on July 31, 1988, stated that jury awards in successful wrongful discharge cases in California stood at $1,469,327 in 1987. Bradsher, "Firms Ask that Workers Waive Job Security," L.A. Times, July 31, 1988, § 1, at 1, col. 2.

[21] Lopatka and Martin, "Developments in the Law of Wrongful Discharge," ABA National Institute, Litigating Wrongful Discharge and Invasion of Privacy Claims, 13-14 (1986).

[22] *See supra*, note 6.

undergo a demographic shift, causing an inevitable increase in the number of individuals at retirement age. As a result, at the same time that pension plans are being put to their most stringent financial tests, thousands of employees who are about to vest in their pension rights will be able to bring tort claims for wrongful discharge seeking extensive compensatory and punitive damages under the decision below. In these circumstances, we believe that an especially compelling basis is presented for exercise of the Court's jurisdiction.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY MCCLENDON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

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MOTION TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of Petitioner in this case. Respondent Perry McClendon has refused consent. In support of this motion, EEAC by the following shows that this brief brings relevant matter to the attention of

the Court that has not already been brought to its attention by the parties.

1. EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. All of EEAC's members, and the constituents of its trade association members, are employers subject to various employment and labor laws, including the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* As employers, virtually all of EEAC's members and member constituencies maintain employee benefit plans for their employees over and above normal wages and salaries. Many of these plans are products of collective bargaining with employee representatives.

3. EEAC members conduct business in virtually all states, and many members themselves have operations in a multitude of states. As potential defendants to state tort suits charging discriminatory interference with rights under employee benefit plans, EEAC's members are interested in the extent to which ERISA pre-empts such claims.

4. Thus, the issues presented for review in this case are extremely important to the nationwide constituency which EEAC represents. The court below held that a tort action under state law charging discriminatory discharge with the intent to interfere with pension rights, which is specifically prohibited by § 510 of ERISA, was not precluded by ERISA's broad pre-emption provision because the plaintiff sought lost wages, damages for mental anguish, and punitive damages, not lost pension benefits.

This conclusion conflicts with numerous decisions of the Circuit Courts of Appeals and various state supreme courts, and contravenes the clear language of ERISA as well as numerous decisions of this Court, supported by a wealth of legislative history, all of which strongly favor broad pre-emption of state tort suits related to employee benefit plans.

Moreover, the decision of the Supreme Court of Texas undermines the uniformity of pension law which Congress sought to establish in enacting ERISA. Accordingly, the decision below significantly burdens the administration of employee benefit plans covered by ERISA, and subjects employers to varying provisions of state law, with the attendant inconsistencies in rules and policies, and exposes employers to tort damages not available under ERISA.

5. EEAC has participated as amicus curiae in several cases involving ERISA pre-emption of state law, including several in this Court.[1] In addition, EEAC has filed amicus curiae briefs with this Court in a number of other cases involving pre-emption of State suits by federal law.[2]

EEAC's interest in this case lies in its desire that the Congressional purpose in enacting ERISA, to "establish

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[1] *General Motors Corporation v. Wells*, No. 89-1067 (*petition for cert. filed* December 27, 1989); *Shaw v. Delta Airlines*, 463 U.S. 85 (1983); *Nolan v. Otis Elevator Co.*, 505 A.2d 580 (N.J. 1986); *Brooklyn Union Gas Co. and American Airlines v. N.Y. Human Rights Appeal Board*, 359 N.E.2d 393 (N.Y. 1976).

[2] *General Motors Corporation v. Wells*, *supra* n.1 (NLRA and § 301 LMRA pre-emption), *Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425 (1987) (§ 301 pre-emption); *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988) (§ 301 pre-emption).

pension plan regulation as an exclusively federal concern," *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981), not be undermined by an unduly narrow interpretation of the ERISA pre-emption provision. Such an interpretation would allow persons in states that permit widely varied employment-related individual tort causes of action to resort to the state courts and state law to resolve disputes more properly addressed through application of uniform federal law. The decision of the Supreme Court of Texas below, which adopts a severely restrictive interpretation of ERISA pre-emption and allows a state tort suit on a cause of action specifically provided by ERISA, creates substantial concern among the employer community regarding the scope of ERISA pre-emption in these cases.

Because of its significant experience, EEAC is uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally, as opposed to its significance to the immediate parties.

WHEREFORE, it is respectfully moved that EEAC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae contingent on the granting of the accompanying motion for leave.[1] The brief supports the petition for a writ of certiorari filed in this case by Ingersoll-Rand Company, and urges reversal of the decision below.

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[1] A letter of consent on behalf of the petitioner has been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is fully set forth in the accompanying motion.

STATEMENT OF THE CASE

Respondent Perry McClendon, who had been employed by Petitioner Ingersoll-Rand since August 1972, was discharged in November 1982 as part of a reduction in force. Pet. App. 1a-2a.[2] At the time, McClendon believed that he needed four more months of service to qualify for a pension benefit, *id.* at 2a, but in fact his pension was vested. *Id.* at n.2.

McClendon brought a state tort suit against Ingersoll-Rand, claiming *inter alia* that Ingersoll-Rand had discharged him in order to avoid making contributions to his pension fund. Pet. App. 1a.[3] The trial court granted summary judgment for the employer, and the Texas Court of Appeals affirmed. *Id.* The Court of Appeals recognized that McClendon "incorrectly concluded that being discharged before ten years of service would prevent him from collecting certain benefits" and that "[h]e was in fact never denied those benefits." Pet. App. 24a. Thus, the Court of Appeals held, "Ingersoll-Rand did nothing more than react to an economic downturn by reducing its sales force. Such conduct is in no way actionable." *Id.*

The Supreme Court of Texas reversed. Finding a state public policy interest in protecting employee pension rights, the court created an exception to the employment-at-will doctrine in Texas, allowing a cause of action where an employee proves that he was discharged to avoid payment of pension benefits. Pet. App. 5a.

[2] Citations to the Petitioner's Appendix are designated as Pet. App. ——.

[3] McClendon also alleged causes of action based on an alleged employment contract, an implied covenant of good faith and fair dealing, and intentional infliction of emotional distress. Pet. App. 17a.

The court's public policy finding was based in part on the existence of § 510 of the Employee Retirement Income Security Act, 29 U.S.C. § 1140, which prohibits discrimination against employees for the purpose of interference with their pension rights. Pet. App. 5a. While recognizing that such cases have been held to be preempted by ERISA, the court asserted that this case was distinguishable because McClendon sought tort damages, not pension benefits. *Id.* at n.3.

Justice Cook filed a strong dissent in which Chief Justice Phillips and Justice Hecht joined. Pet. App. 6a-13a. Agreeing with the majority that "ERISA demonstrates the great significance attached to income security for retirement," Justice Cook went on to recognize that § 510 is *so* significant that it "confers upon employees a federal version of the cause of action created by this court, confines litigation of the federal cause of action to the federal courts, and preempts the state cause of action." Pet. App. 6a.

Justice Gonzalez, who also dissented, joined Justice Cook's conclusion that ERISA pre-empts McClendon's cause of action. *Id.* at 13a. He also observed that the majority's reliance on two decisions of the U.S. District Court for the Eastern District of New York was "misplaced," since both the Northern District of New York and a New York court of appeals had refused to follow them. *Id.* at 15a.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Section 514 of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, broadly pre-empts state laws, including common law developed through court decision, which relate to employee benefit plans. Section 510 prohibits discrimination against employees for the purpose of interfering with the attainment of

rights under an employee benefit plan, and provides a civil cause of action to an employee who is the victim of such discrimination. Notwithstanding ERISA's broad pre-emption provision and its provision of a cause of action for interference with employee benefits, the Supreme Court of Texas held that an action could be maintained in state court under state law for a claim that mirrors § 510.

The decision below conflicts directly with numerous federal and state court decisions holding that ERISA pre-empts state causes of action. Indeed, it also conflicts with this Court's decision in *Pilot Life Insurance Company v. Dedeaux*, 107 S. Ct. 1549 (1987), which conclusively established ERISA pre-emption of state common law tort and contract claims regarding improper processing of benefit plans, and which applies by analogy to the decision below.

Moreover, the Texas Supreme Court's decision is incorrect under the clear statutory language of ERISA, as supported by the legislative history and applied by this Court. The court below reasoned that ERISA pre-emption was inapplicable because the plaintiff sought tort damages rather than pension benefits. Since Congress specifically chose to supersede state causes of action as well as any state remedies that might be available, with an exclusively federal remedy, a claim for state tort damages cannot overcome ERISA's complete pre-emption of state laws that "relate to" employee benefit plans.

The decision of the Supreme Court of Texas seriously erodes the uniform federal system of employee benefit regulation that Congress sought to establish in enacting ERISA. Moreover, the holding below seriously burdens the numerous employers who voluntarily maintain employee benefit plans, many of which operate in more than one state. The Texas Supreme Court's decision would allow the application of both federal and state requirements to employee benefit plans, causing substantial confusion.

In addition, exposure to diverse state and local laws and regulations will hinder the maintenance of uniform benefit plans by multistate employers, requiring them to choose between administering costly individual plans in each state and eliminating benefits that conflict with the requirements of a partcular jurisdiction. These concerns formed the basis for ERISA's intentionally broad pre-emption provision, and have influenced this Court in numerous decisions recognizing the exclusively federal nature of claims related to benefit plans. For these reasons, it is crucial that this Court grant the petition to counteract the damage done by the decision below to employee benefit plans.

REASONS FOR GRANTING THE WRIT

I. THE TEXAS SUPREME COURT'S HOLDING THAT ERISA DOES NOT PRE-EMPT STATE TORT SUITS FOR INTERFERENCE WITH EMPLOYEE BENEFITS IS IN DIRECT CONFLICT WITH DECISIONS OF THE FEDERAL COURTS AND ANOTHER STATE SUPREME COURT, AND INCORRECTLY INTERPRETS ERISA PRE-EMPTION

A. The Decision Below Directly Conflicts with Numerous Decisions of Federal and State Courts Holding That ERISA's Broad Pre-emption Provision Precludes State Tort Suits Related to Employee Benefit Plans

1. *The Decision Below Conflicts with Those of Other Courts Holding That State Tort Suits for Interference with Pension Benefits Are Pre-empted by ERISA*

The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw*

v. Delta Air Lines, Inc., 463 U.S. 84, 90 (1983). Section 510 of ERISA provides in pertinent part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefit] plan . . . The provisions of Section 1132 of this title [relating to civil enforcement] shall be applicable in the enforcement of this section.

29 U.S.C. § 1140. Thus, § 510 prohibits an employer from discharging an employee in order to avoid payment of benefits, and creates a civil cause of action in favor of such employee. *See, e.g., Cox v. Keystone Carbon Co.*, 861 F.2d 390, 391-2 (3d Cir. 1988) (§ 510 prevents employers from discharging employees to keep them from obtaining plan benefits, and authorizes a civil action).[4]

ERISA contains broad language pre-empting state action relating to employee benefit plans:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

Section 514, 29 U.S.C. § 1144(a).[5]

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[4] *See also Dister v. The Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988); *Gavalik v. Continental Can Company*, 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987) (burden of proof in a civil action under § 510).

[5] Subsection (b) generally excepts (1) causes of action occurring before January 1, 1975; (2) state laws regulating insurance, banking and securities; (3) use of the services or facilities of a State; (4) state criminal laws; (5) the Hawaii Prepaid Health Care Act; (6) certain state laws regulating some multiple employer welfare arrangements; and (7) qualified domestic relations orders, none of which are relevant here.

In direct contrast to the decision below, several courts have held that ERISA pre-empts a state tort suit in which an employer is alleged to have discharged a worker to avoid paying benefits. In *Sorosky v. Burroughs Corporation*, 826 F.2d 794 (9th Cir. 1987), an employee claimed wrongful discharge on a number of theories, including an allegation that his employer discharged him in an attempt to avoid paying him monthly retirement benefits. 826 F.2d at 800. The Ninth Circuit ruled that ERISA pre-empted the wrongful discharge claim "to the extent that. . . [it] refers to the employee benefit plan." *Id.* Likewise, the Supreme Court of Appeals of West Virginia, the highest court in that state, has upheld a grant of summary judgment in favor of an employer based on ERISA pre-emption when an employee claimed that he was discharged to prevent vesting of his pension rights. *Conaway v. Eastern Associated Coal Corporation*, 358 S.E.2d 423 (W. Va. 1986).

In addition, numerous federal district courts have reached the same conclusion, and have rejected state tort claims fitting the description in ERISA § 510. In *Harvey v. I.T.W. Inc.*, 672 F. Supp. 973 (W.D. Ky. 1987), a former employee based his claim of discharge in violation of public policy on the policy expressed in § 510, as did the Texas Supreme Court below. The court granted summary judgment on the grounds of ERISA pre-emption.

In a similar case, the U.S. District Court for the District of Maryland held that ERISA pre-empted a plaintiff's claim for damages for emotional distress, mental anguish and punitive damages allegedly resulting from an employer's intentional discharge to prevent her retirement benefits from vesting. *Pratt v. Delta Air Lines, Inc.*, 675 F. Supp. 991 (D. Md. 1987). The court specific-

ally rejected the plaintiff's argument, like that adopted by the court below, that the suit was not pre-empted because it involved a claim for damages other than retirement benefits. 675 F. Supp. at 998-99.[6]

2. *The Decision Below Likewise Conflicts with Decisions Holding That Suits Claiming Interference with Other Employee Benefits Are Pre-empted*

In harmony with the numerous decisions holding that state suits alleging discharge to interfere with pension benefits are pre-empted by ERISA, several courts have held that similar suits concerning interference with other benefits are pre-empted as well. In *Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir. 1989), the First Circuit concluded that a claim that an employee was discharged to avoid having to pay health benefits for his wife was pre-empted by ERISA since the claim "related to" an employee benefit plan and § 510 creates a cause of action

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[6] *See also Treadwell v. John Hancock Mutual Life Insurance Company*, 666 F. Supp. 278, 282-283 (D. Mass. 1987) (state law wrongful termination claim comparable to that provided by § 510 pre-empted by ERISA); *Miner v. International Typographical Union Negotiated Pension Plan*, 601 F. Supp. 1390, 1394 (D. Colo. 1985) (state law claims redundant of ERISA claims pre-empted); *King v. James River-Pepperell, Inc.*, 593 F. Supp. 1344, 1346 (D. Mass. 1984) (action "nearly identical" to those prohibited by ERISA pre-empted); *Kelly v. International Business Machines Corporation*, 573 F. Supp. 366, 371 (E.D. Pa. 1983), *aff'd without opinion*, 746 F.2d 1467 (3d Cir. 1984) (state claim addressing the "same type of wrong prohibited by" § 510 pre-empted); *Gordon v. Matthew Bender & Company, Inc.*, 562 F. Supp. 1286, 1294 (N.D. Ill. 1983) (ERISA § 510 already provides a remedy for employee discharged shortly before vesting date, thus claim pre-empted). To underscore the conflict, it is unlikely that McClendon would have succeeeded on the merits had he brought his claim under § 510 rather than state law. *See Corum v. Farm Credit Services*, 628 F. Supp. 707, 717 (D. Minn. 1986) ("Since plaintiff's pension rights were vested, he cannot maintain that defendant fired him in order to prevent plaintiff from obtaining vested pension rights.").

under ERISA addressing this type of claim. *Id.* at 588.[7] The Eighth Circuit reached a similar conclusion in *Dependahl v. Falstaff Brewing Corporation*, 653 F.2d 1208 (8th Cir. 1981), holding that common law claims of tortious interference with severance pay and life insurance plans are pre-empted by ERISA. *Id.* at 1216.

3. *The Decision Below Conflicts with This Court's Ruling in* Pilot Life *That State Claims within The Scope of ERISA Are Pre-empted*

In *Pilot Life Insurance Company v. Dedeaux*, 107 S. Ct. 1549 (1987), this Court considered whether ERISA pre-empted state comon law tort and contract claims regarding improper processing of benefit claims. *Id.* at 1550-51. The Court first examined the breadth of the ERISA pre-emption provision, noting that "We have observed in the past that the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" *Id.* at 1552, quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). Agreeing with the Solicitor General's argument that:

> Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits, and that varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress

107 S. Ct. at 1555, the Court ruled that such claims are pre-empted by ERISA.

Like claims for improper processing of benefits, claims of discriminatory discharge for the purpose of inter-

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[7] *See also Folz v. Marriott Corporation*, 594 F. Supp. 1007 (W.D. Mo. 1984) (state tort claim for discharge to eject plaintiff from self-funded medical benefits plans pre-empted by ERISA).

ference with pension benefits are specifically provided with a cause of action under ERISA, implemented by the civil enforcement scheme of § 502. 29 U.S.C. § 1140. As the Court observed in *Pilot Life*, "[t]he deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." 107 S. Ct. at 1556-57. Thus, under the rationale of *Pilot Life*, state law claims which mirror ERISA § 510 are likewise pre-empted, and the decision below directly conflicts with that rationale.

B. The Decision Below Incorrectly Interprets ERISA, Which Broadly Pre-empts State Tort Actions

1. *The Statutory Language, The Legislative History, and This Court's Interpretations Mandate Pre-emption of State Tort Actions That Mirror § 510 of ERISA*

This Court has "virtually taken it for granted that state laws which are 'specifically designed to affect employee benefit plans' are pre-empted under § 514(a)." *Mackey v. Lanier Collections Agency & Service, Inc.*, 108 S. Ct. 2182, 2185 (1988). As the state common law developed by the court below is so designed, it is pre-empted by ERISA. The decision below, which holds to the contrary, mistakenly interprets the law.

As noted above, ERISA unequivocally pre-empts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a).[8] This Court has emphasized repeatedly the

[8] State judicial decisions as well as legislative pronouncements are pre-empted, since § 514 of ERISA defines "state law" to "include all laws, *decisions*, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1) (emphasis added). *See also Pilot Life Insurance Company v. Dedeaux*, 107 S. Ct. at 1553 n.1 (state decisional law included within definition of "state law" under § 514).

broad scope of ERISA's pre-emption provision, underscored by clear legislative history indicating Congressional intent to "establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 523 (1981).

This Court's decision in *Pilot Life* contains a thorough discussion of that legislative history. 107 S. Ct. at 1552. Congress rejected a pre-emption clause "applicable only to state laws relating to the specific subjects covered by ERISA . . . in favor of" the present broad language. *Id.*, quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 98. Moreover:

> The House and Senate sponsors emphasized both the breadth and importance of the pre-emption provisions. Representative Dent described the "reservation to Federal authority the sole power to regulate the field of employee benefit plans" as ERISA's "crowning achievement." 120 Cong. Rec. 29197 (1974). Senator Williams said:
>
> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." *Id.* at 29933.
>
> See also *Shaw v. Delta Air Lines, Inc.*, *supra*, at 99-100, n.20, 103 S.Ct. at 2901, n.20 (describing remarks of Senator Javits).

107 S. Ct. at 1552. Thus, this Court already has recognized the strong legislative support for broad ERISA pre-emption of state laws.

Whether the state tort action here "relates to" a benefit plan, as required for pre-emption by § 514, is

also beyond dispute. This Court already recognized in *Pilot Life* its prior decisions in which "[t]he phrase 'relate to' was given its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Pilot Life*, 107 S. Ct. at 1553, quoting *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985), quoting *Shaw v. Delta Air Lines*, 463 U.S. at 97.

A state law need not be designed specifically to affect employee benefit plans to be pre-empted. "ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern . . . . ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision." *Alessi*, 451 U.S. at 525. Where, as here, the state common law creating a cause of action mirrors a specific section of ERISA creating a cause of action under the same facts, it can hardly be said that the state law does not "relate to" a benefit plan.

Indeed, when the succinct formula used by this Court in *Metropolitan Life Insurance Company v. Taylor*, 107 S. Ct. 1542 (1987), is applied, it is clear that the state law action under scrutiny here is pre-empted by ERISA. Like *Pilot Life*, *Taylor*, which was decided on the same day, involved common law claims for improper processing of a benefit claim.[9] This Court quickly established that such claims were pre-empted, as follows:

> Under our decision in *Pilot Life Ins. Co. v. Dedeaux*, Taylor's common law contract and tort claims are pre-empted by ERISA. This lawsuit "relate[s] to [an] employee benefit plan." It is based upon common law of general application that is not a law regulating insurance. Accordingly, the suit is pre-empted by § 514(a) and is not saved by § 514(b)(2)(A). Moreover, as a suit by a beneficiary to recover benefits from a covered plan, it falls directly under § 502(a)(1)(B) of ERISA, which provides an exclusive federal cause of action for resolution of such disputes.

[9] *Taylor* held that "complaints filed in state courts purporting to plead . . . state common law causes of action [for improper processing of benefits] are removable to federal court" because they are "displaced by ERISA's civil enforcement provision." 107 S. Ct. at 1544-45.

107 S. Ct. at 1546 (citations omitted). Like *Taylor*, this case relates to an employee benefit plan, is based on common law, and falls directly under an ERISA provision providing an exclusively federal cause of action. Thus, McClendon's state law claim, which mirors a claim under § 510 of ERISA, is pre-empted by § 514.[10]

2. *The Decision Below Incorrectly Distinguishes Suits for Damages, as Opposed to Suits for Benefits, as Being Exempt from ERISA Pre-emption*

The court below attempted to distinguish selected cases representing the wealth of authority supporting ERISA pre-emption by arguing that "here the plaintiff acknowledged in his brief to the court of appeals that he is *not* seeking lost *pension benefits* but is instead seeking future wages, mental anguish and punitive damages as a result of the wrongful discharge." Pet. App. 5a n.3 (emphasis in original). This distinction does not suffice.

[10] The few cases that have held to the contrary likewise incorrectly interpret the law. As Justice Gonzales aptly noted in his dissent below, "the [Texas Supreme] court's reliance upon two federal district court cases, *Hovey v. Lutheran Medical Center*, 516 F. Supp. 554 (E.D.N.Y. 1981) and *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D.N.Y. 1980), is misplaced" because subsequent decisions of federal and state courts in New York have refused to follow them. Pet. App. 15a-16a. In *K Mart Corp. v. Ponsock*, 732 P.2d 1364 (Nev. 1987), where a jury award for compensatory and punitive damages for breach of an implied covenant of good faith and fair dealing based upon an employee's claim that he was terminated to avoid payment of pension benefits was upheld, the court did not address the issue of ERISA pre-emption.

There is no basis whatsoever for suggesting that ERISA pre-emption may be inapplicable due to the type of remedy sought. The statutory language pre-empts "any and all state laws" without any such restriction. 29 U.S.C. § 1144(a). Moreover, in determining that state tort claims for improper processing of benefits are pre-empted by ERISA, this Court specifically rejected the concept of separate state remedies for the same wrong, stating:

> The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. . . The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.

Pilot Life, 107 S. Ct. at 1556-57.

The inapposite distinction articulated by the court below was specifically rejected by a federal district court in *Pratt v. Delta Air Lines*, 675 F. Supp. 991 (D. Md. 1987). There, as here, in a state law tort claim for discharge intended to interfere with retirement benefits, the argument was made that ERISA pre-emption was inapplicable because the suit was for damages, not merely benefits. Relying on *Pilot Life*, the court found the state tort claim pre-empted.

The court below attempted to evade ERISA pre-emption through artful characterization of the claim as one for damages rather than benefits. This subterfuge clearly seeks to "avoid[] through form the substance of the pre-emption provision." *Alessi*, 451 U.S. at 525. As this Court has already rejected the concept that additional state law remedies are available for ERISA-protected rights, Respondent's claim for additional remedies, used

by the court below to escape ERISA pre-emption, is clearly irrelevant.

II. THE DECISION BELOW, BY ALLOWING A STATE TORT SUIT IN A CLAIM GOVERNED BY ERISA, UNDERMINES THE CONSISTENT SYSTEM OF PENSION REGULATION ESTABLISHED BY CONGRESS IN ERISA AND SERIOUSLY BURDENS THE VAST NUMBER OF EMPLOYERS WHO MAINTAIN EMPLOYEE BENEFIT PLANS

A. The Decision Below Seriously Undermines The Uniform System of Pension Regulation Congress Intended To Establish with ERISA

As noted above, § 514 of ERISA was "meant to establish pension plan regulation as exclusively a federal concern." *Alessi*, 451 U.S. at 523. Explaining ERISA's broad pre-emption provision, Senator Javits stated that "the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs." 120 Cong. Rec. 29942 (1974) (remarks of Senator Javits). Instead of a plethora of conflicting state laws, ERISA's sponsors anticipated that with broad pre-emption of state regulation, "a body of Federal substantive law will be developed by the court to deal with issues involving rights and obligations under private welfare and pension plans." *Id.* Accordingly, "[t]he pre-emption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." *Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. at 739.[11]

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[11] *See also Mackey v. Lanier Collections Agency & Service, Inc.*, 108 S. Ct. at 2185 ("legislative 'good intentions' do not save a state law within the broad pre-emptive scope of § 514(a).").

The decision below, by allowing a state cause of action that is covering the same conduct as § 510 of ERISA, seriously undermines the uniform federal regulation of benefit plans that Congress intended to establish. It allows the state of Texas, and any other state which follows suit, to impose its own concept of appropriate regulation on the federal scheme.

As this Court has recognized:

> The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop, indeed, the entire comparison of ERISA's § 502(a) to § 301 of the LMRA, would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws.

Pilot Life, 107 S. Ct. at 1558. The decision below indeed frustrates the expectations of Congress.

B. The Decision Below, by Allowing a State Tort Action That Mirrors ERISA § 510, Seriously Burdens Employers Who Maintain Employee Benefit Plans

This Court has already recognized the serious problem that would be created by the imposition of varying state laws on employee benefit plans. Holding that ERISA pre-empted a state human rights law prohibiting practices permitted by federal law, the Court observed that:

> An employer with employees in many States might find that the most efficient way to provide benefits to those employees is through a single employee benefit plan. Obligating the employer to satisfy the varied and perhaps conflicting requirements of particular state fair employment laws, as well as the requirements of Title VII, would make administration of a uniform nationwide plan more difficult.

Shaw v. Delta Air Lines, Inc., 463 U.S. at 105 n.25. The Court conjectured that employers in this position would have to administer separate plans in each State, offsetting

the cost of the increased administrative burden by lowering benefit levels, or adapt the uniform plan by eliminating classes of benefits. *Id.* The Court concluded, "ERISA's comprehensive pre-emption of state law was meant to minimize this sort of interference with the administration of employee benefit plans." *Id.*

In enacting ERISA, Congress recognized the inherent difficulties in allowing state regulation of benefit plans, and thus adopted § 514 to "eliminat[e] the threat of conflicting or inconsistent State and local regulation of employee benefit plans." 120 Cong. Rec. 29933 (1974) (remarks of Senator Williams). As the Court agreed with the Solicitor General in *Pilot Life*, "varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress." 107 S. Ct. at 1555.

These concerns are real. Of the 21.3 million full-time employees of medium-sized and large private firms in 1986, ninety percent participated in pension plans and had employer-sponsored health insurance. Employee Benefit Research Institute, Questions and Answers About Employee Benefits, EBRI Issue Brief No. 89 at 1 (April 1989). A substantial number of companies, including EEAC's members, are multistate employers, many of whom do business in all fifty states. Any erosion of ERISA's pre-emption provision will subject employee benefit plans to burdensome and costly state and local regulation, will severely hamper their efforts to maintain uniform and equitable benefits for their workforces, and will infringe on their ability to engage in free collective bargaining on benefits with unions representing their employees.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 89-1298

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,

Petitioner,

v.

PERRY McCLENDON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

MOTION AND BRIEF OF AMICUS CURIAE AMERICAN PAPER INSTITUTE, INC. IN SUPPORT OF PETITIONER

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MOTION OF AMICUS CURIAE AMERICAN PAPER INSTITUTE, INC. IN SUPPORT OF PETITIONER

The American Paper Institute, Inc. ("API") hereby moves for leave to file the attached brief *amicus curiae* in support of a petition for a writ of certiorari. The consent of the attorneys for the petitioner has been obtained. The consent of the attorneys for the respondent was requested but refused.

API is the national trade association of the pulp, paper and paperboard manufacturing industry. The approximately 170 member companies of API produce more than 90% of the pulp, paper and paperboard manufactured in the United States. At issue in this case is the Supreme Court of Texas' decision that a cause of action for wrongful

discharge exists under Texas law when an employee alleges that the principal reasons for his termination was the employer's desire to avoid contributing to or paying employee benefits. The Supreme Court of Texas held, with minimal discussion, that the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144, did not preempt the state law cause of action recognized by the court.

API is interested in this action because its members sponsor various employee benefit plans, and many API members have employees in several states. The Supreme Court of Texas' decision rejecting ERISA's preemptive effect, if allowed to stand, will have deleterious effects throughout the paper industry, as well as on employers in other industries. This decision encourages wrongful discharge actions and permits conflicting and inconsistent state and local decisions whenever an employee alleges that the reason for a discharge was the employer's desire to deprive the employee of employee benefits or to avoid benefit contributions. It is believed that the brief which *amicus curiae* is requesting permission to file will contain a more complete argument on the issue of ERISA preemption.

Based on the foregoing, the motion for leave to file the attached brief *amicus curiae* should be granted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF OF AMICUS CURIAE AMERICAN PAPER INSTITUTE, INC. IN SUPPORT OF PETITIONER

American Paper Institute, Inc. ("API") respectfully submits this petition, *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of a petition for a writ of certiorari to the Supreme Court of Texas.

INTEREST OF THE AMICUS CURIAE

API is the national trade association of the pulp, paper and paperboard manufacturing industry. The approximately 170 member companies of API produce more than 90% of the pulp, paper and paperboard manufactured in the United States. API respectfully submits this brief *amicus curiae* to urge the Supreme Court to grant the petition for

a writ of certiorari to the Supreme Court of Texas. The latter Court held incorrectly that a cause of action for wrongful discharge exists under Texas law when an employee alleges that the principal reason for his termination was the employer's desire to avoid contributing to or paying employee benefits. The Supreme Court of Texas held, with minimal discussion, that the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144, did not preempt the state law cause of action. API is interested in this action because its members sponsor various employee benefit plans, and many API members have employees in several states. The Supreme Court of Texas' decision rejecting ERISA's preemptive effect, if allowed to stand, will have deleterious effects throughout the paper industry, as well as on employers in other industries. This decision encourages wrongful discharge actions and permits conflicting and inconsistent state and local decisions whenever an employee alleges that the reason for a discharge was the employer's desire to deprive the employee of employee benefits or to avoid benefit contributions.

ARGUMENT

I

PUBLIC POLICY MANDATES THAT ERISA PREEMPT STATE WRONGFUL DISCHARGE ACTIONS RELATING TO EMPLOYEE BENEFIT PLANS

As the Court recognized in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), it is not surprising that the Court is again called upon to interpret the scope of ERISA preemption "[g]iven the 'statutory complexity' of ERISA's three pre-emption provisions, as well as the wide variety of state statutory and decisional law arguably affected by the federal pre-emption provisions . . . ." supra at 47 (citation omitted). The decision of the Supreme Court of Texas

presents important ERISA preemption issues which have not been addressed by the Court. Further, the opinion conflicts with decisions of various federal circuit courts and the Supreme Court of West Virginia. *See Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir. 1989), *Pane v. RCA Corp.*, 868 F.2d 631 (3rd Cir. 1989), *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987), *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 and 454 U.S. 1084 (1981), and *Conaway v. Eastern Associated Coal Corp.*, 358 S.E. 2d 423 (W. Va. 1986).

The Court has never squarely addressed whether ERISA preempts state wrongful discharge actions involving benefit issues. *Pilot Life, supra, Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), addressed related issues concerning preemption of state common law claims and statutes, but did not address wrongful discharge actions.

This is a critical issue to the members of API, as well as employers in other industries. A recent study has shown that approximately 39 states have recognized in various circumstances that an employee has a common law right of action for wrongful termination where the discharge violates public policy. Four other states have not ruled out recognition of a public policy exception. I. Shepard, P. Heylman and R. Duston, *Without Just Cause: An Employer's Practical and Legal Guide on Wrongful Discharge* 18, BNA Special Report (1989). At least one other state and two federal district courts have recognized a cause of action for wrongful discharge based upon allegations of intended interference with potential pension benefits. *See K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1365 (Nev. 1987). *See also Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822, 826 (E.D.N.Y. 1980), *Hovey v. Lutheran Medical Center*, 516 F. Supp. 554, 557-58 (E.D.N.Y. 1981).*

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* In none of these cases did the court discuss ERISA preemption.

If the decision below is not reviewed and reversed by the Court, employers will be bombarded with wrongful discharge claims alleging that a discharge was prompted to avoid payment of employee benefits. The Supreme Court of Texas' decision also held that an employer who discharges an employee in order to avoid benefit contributions commits a tort under state law. Whenever an employee covered by a benefit plan is terminated, a result is cessation of benefit contributions on behalf of the former employee. If the decision below is permitted to stand, every discharge may be challenged in state court on this theory. Employers will be subjected to a multiplicity of state wrongful discharge actions decided under different rules, laws, and decisional authority.

II

PREEMPTION OF WRONGFUL DISCHARGE CLAIMS FURTHERS THE PURPOSE OF ERISA PREEMPTION

It is ironic that the Supreme Court of Texas, in holding that a Texas wrongful discharge cause of action exists, cited ERISA Section 510, 29 U.S.C. § 1140, to support its proposition that public policy recognizes the importance of protecting employees' interests in pension plans. The Texas Court added, "[t]he very passage of ERISA demonstrates the great significance attached to income security for retirement purposes". *McClendon v Ingersoll-Rand Co.*, 779 S.W.2d 69, 71 (Texas 1989). The Supreme Court of Texas' own opinion recognizes the strong federal interest in regulating wrongful discharge actions relating to benefit claims.

Preemption of state wrongful discharge claims relating to employee benefit plans furthers the purpose of ERISA preemption. ERISA's unique preemption provisions were designed to develop a body of federal substantive law to

resolve issues involving rights and obligations under employee benefit plans. *See Firestone Tire and Rubber Co. v. Bruch*, 109 S. Ct. 948, 954 (1989); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). In enacting ERISA, Congress intended to "round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." 120 Cong. Rec. 29197 (1974) (remarks by Representative Dent). Consequently, Congress preempted state law if it "relates to" employee benefit plans. The Court has on several occasions, broadly interpreted, the preemption provisions of ERISA. *See Pilot Life Ins. Co. v. Dedeaux, supra* at 46, *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985), *Shaw v. Delta Air Lines, Inc., supra* at 98, *Alessi v. Raybestos-Manhattan, Inc., supra* at 523. The decision below undermines the application of the uniform national standards of conduct that ERISA was designed to create and is contrary to the Court's interpretation of ERISA preemption. *See* ERISA Section 2(b), 29 U.S.C. § 1001(b).

III

ERISA SECTION 510 EXPLICITLY APPLIES TO WRONGFUL DISCHARGE ACTIONS AND IS PART OF ERISA'S COMPREHENSIVE CIVIL ENFORCEMENT SCHEME

Section 510 of ERISA explicitly applies to claims of wrongful discharge relating to benefit claims. Section 510 states, in relevant part,:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

Violations of Section 510 are enforced pursuant to the civil enforcement scheme set forth in ERISA. *See* Section 502(a), 29 U.S.C. § 1132(a). The Court has recognized the comprehensive nature of ERISA's enforcement provisions. *Pilot Life Ins. Co., supra* at 46. State law causes of actions modelled on Section 510 improperly intrude on the exclusive reservation to federal authority of the sole power to regulate the field of employee benefits.

ERISA protects not only employee benefits; Section 510 protects participants and beneficiaries from adverse employment actions related to their ERISA rights. This section applies to any claim of improper discharge relating to benefits. Perry McClendon alleges that he was discharged for the purpose of interfering with his right to a pension. This claim falls squarely within the ambit of Section 510 and is clearly preempted. *See, e.g., Dister v. Continental Group Inc.*, 859 F.2d 1108 (2d Cir. 1988), *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987), *cert. denied*, 484 U.S. 979 (1987).

The Supreme Court of Texas, in rejecting ERISA preemption, appears to emphasize the damages available under state tort law which may not be available under ERISA, such as punitive damages and compensation for mental anguish. In addition, under a state wrongful discharge action, there may be a right to a jury trial, which may not be present under ERISA. The policy choices reflected in the selection of remedies under ERISA would be "completely undermined" if employees were free to obtain remedies under state law that Congress rejected in ERISA. *Pilot Life, supra* at 42; *see also Authier v. Ginsberg*, 757 F.2d 796, 801-2 (6th Cir. 1985).* As stated by the Court in *Pilot Life*:

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* The remedies provided under ERISA are extremely broad and include injunctive relief, appropriate equitable relief, and reasonable attorneys' fees and costs. ERISA Section 502(a) and (g), 29 U.S.C. §§ 1132(a) and (g).

> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.

Pilot Life, supra, at p. 54.

If state courts are permitted to grant remedies in actions relating to employee benefits that were expressly rejected by Congress in drafting ERISA, the exclusive federal regulatory scheme will be emasculated.

IV

THE CLAIM BELOW "RELATES TO" AN EMPLOYEE BENEFIT PLAN AND IS PREEMPTED

The Supreme Court of Texas concluded that ERISA preemption was not applicable because the plaintiff was not seeking lost pension benefits but was instead seeking future wages, compensation for mental anguish and punitive damages as a result of the wrongful discharge. *McClendon, supra* at 71. This case raises important questions concerning the interpretation of the term "relate to" as set forth in ERISA Section 514(a), 29 U.S.C. § 1144(a).

The Supreme Court of Texas completely ignored this Court's analysis concerning the meaning of the term "relate to any employee benefit plan" set forth in Section 514(a). The Court has interpreted the term "relate to" expansively. *See Ft. Halifax Packing Co. v. Coyne*, 482 U.S. 1, (1987), *Metropolitan Life Insurance Co. v. Massachusetts, supra, Alessi v. Raybestos-Manhattan, Inc., supra*. In *Shaw v. Delta Air Lines, Inc., supra* at 97, the Court held that the phrase should be given its broad common-sense meaning, such that a state law "relates to" an employee benefit plan if it has a "connection with or reference to such a plan".

For example, in *Pilot Life*, an employee brought state common law tort and contract actions asserting improper processing of a claim for benefits under an insured employee benefit plan. The Court stated that the employee's state common law claims of tortious breach of contract, breach of fiduciary duties, and fraud in the inducement "related to" an employee benefit plan and fell under ERISA's preemption provisions. *supra* at 47. *But see Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989).

In the case below, Perry McClendon alleges that Ingersoll-Rand terminated him to escape its obligation to contribute to his pension fund. Despite his failure to seek pension benefits, his claim plainly relates to the Company's pension plan. A "common-sense" understanding of the phrase "relates to" leads to the conclusion that this case is preempted by ERISA. *Shaw, supra*, at 97.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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No. 89-1298

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY MCCLENDON,
Respondent.

On Writ of Certiorari to the Supreme Court of Texas

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 12, 1990
CERTIORARI GRANTED APRIL 16, 1990

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* The opinions of the Supreme Court of Texas, the Court of Appeals of Texas, and the district court are reprinted in the appendix to the petition for a writ of certiorari at Pet. App. 1a-16a, 17a-24a, and 25a-26a, respectively, and have not been reproduced here. Likewise, the judgment of the Supreme Court of Texas, and its order denying rehearing, are reprinted in the appendix to the petition at 27a and 28-29a, respectively, and are not reproduced here.

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IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD DISTRICT

No. 84-44080

PERRY MCCLENDON

v.

INGERSOLL-RAND COMPANY D/B/A
INGERSOLL-RAND COMPANY CONSTRUCTION
EQUIPMENT GROUP

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
07/10/84	Plaintiff's Original Petition filed
08/16/84	Defendant's Original Answer and Interrogatories filed
02/04/85	Plaintiff's First Amended Petition filed
02/05/85	Defendant's Answers to Plaintiff's Interrogatories filed
02/05/85	Oral Deposition of Perry McClendon conducted
02/05/85	Oral Deposition of Warren J. Carroll conducted
06/10/87	Defendant's Motion for Summary Judgment filed
07/20/87	Plaintiff's Response to Motion for Summary Judgment filed
07/22/87	Defendant's Reply to Plaintiff's Response to Motion for Summary Judgment filed

DATE	FILINGS-PROCEEDINGS
07/27/87	Plaintiff's Second Amended Original Petition filed
07/27/87	Plaintiff's Motion for Leave to File Amended Petition filed
07/31/87	Order Granting Defendant's Motion for Summary Judgment filed
08/27/87	Appeals Bond to Court of Civil Appeals filed
12/13/89	Order Reversing and Remanding received

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME
JUDICIAL DISTRICT OF TEXAS
AT HOUSTON, TEXAS

No. C14-87-00768-CV

PERRY MCCLENDON,
Appellant

v.

INGERSOLL-RAND COMPANY D/B/A
INGERSOLL-RAND COMPANY CONSTRUCTION
EQUIPMENT GROUP,
Appellee

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
09/29/87	Appeal filed
01/08/88	Issues joined
07/21/88	Opinion filed—affirmed
08/05/88	Petition for Rehearing filed
08/18/88	Order overruling Petition for Rehearing filed
09/19/88	Writ of Error filed

IN THE SUPREME COURT OF TEXAS

No. C-7973

PERRY MCCLENDON,
Petitioner
v.
INGERSOLL-RAND COMPANY D/B/A INGERSOLL-RAND COMPANY CONSTRUCTION EQUIPMENT GROUP,
Respondent

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
10/03/88	Application for Writ of Error received
02/22/89	Order Granting Application for Writ of Error filed
02/22/89	Writ of Error issued
03/22/89	Oral Argument held
10/18/89	Opinion filed—reversed and remanded
10/18/89	Dissenting Opinion by Gonzalez, J., joined by Phillips, C.J., and Hecht, J., filed
10/18/89	Dissenting Opinion by Gonzalez, J., filed
10/19/89	Judgment Letter issued
11/02/89	Petition for Rehearing filed
11/15/89	Order overruling Petition for Rehearing filed
12/11/89	Mandate issued
01/04/90	Motion to Recall Mandate filed
01/08/90	Order overruling Motion to Recall Mandate filed
02/26/90	Notice of Filing of Petition for a Writ of Certiorari to United States Supreme Court received
05/02/90	Order granting Motion for a Stay Order

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON
v.
INGERSOLL-RAND CO. D/B/A INGERSOLL-RAND CO. CONSTRUCTION EQUIPMENT GROUP

PLAINTIFF'S ORIGINAL PETITION

[Filed July 10, 1984]

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now PERRY McCLENDON, hereinafter called Plaintiff, complaining of INGERSOLL-RAND CO. dba INGERSOLL-RAND CO. CONSTRUCTION EQUIPMENT GROUP, hereinafter called Defendant, and for cause of action would respectfully show unto the Court and Jury as follows:

I.

Plaintiff is a resident of DeSoto, Dallas County, Texas.

Defendant is a corporation, joint venture, partnership or some other type of business entity having offices and doing business in Harris County, Texas and may be served with citation through the Secretary of State of the State of Texas by mailing to 200 Chestnut Ridge Road, Woodcliff Lake, New Jersey 07675.

II.

This cause of action arises out of a premature and wrongful termination of Plaintiff's employment by Defendant on or about November 19, 1982. This termination violated and breached a contract with, agreements with and promises to Plaintiff, who had worked for Defendant for some nine (9) years and eight (8) months.

III.

Defendant's termination of Plaintiff was with unreasonably short notice, without good and reasonable cause, and/or done in bad faith. Defendant's actions and wrongs in this regard have resulted in damage and injury to Plaintiff.

IV.

As a consequence and result of Defendant's wrongful actions Plaintiff has sustained a loss of income and commission, personal expense and inconvenience, loss of employee benefits and profit sharing and retirement programs, sleeplessness, nervousness and mental anguish and emotional distress.

V.

Because of the above and foregoing, Defendant should compensate Plaintiff for his losses and injuries and damages, and Defendant should also be required to pay exemplary damages by virtue of their conduct and the circumstances surrounding this termination. Plaintiff also seeks recovery of pre-judgment interest and attorney's fees, in a reasonable and just amount. Plaintiff's damages greatly exceed the minimum jurisdictional limits of this Court.

VI.

At the time of his termination Plaintiff was 45 years of age, with a life expectancy of 29.1 years, according to the United States Life Tables, 1978, Volume II, Section 5, a certified copy of which will be used by Plaintiff as evidence in the trial of this case, and Defendant is hereby notified of said intent.

VII.

By reason of all of the above and foregoing, and on account of the injuries suffered by your Plaintiff on the occasion made the basis of this suit, your Plaintiff is entitled to recover damages from Defendant in an amount greatly in excess of the minimum jurisdictional limits of the Court, which amount will be more specifically stated prior to the submission of this case to the Jury.

WHEREFORE, PREMISES CONSIDERED, your Plaintiff prays that the Defendant be cited in terms of law to appear and answer herein, and that upon final trial of this case, he have judgment against the Defendant, in an amount greatly in excess of the minimum jurisdictional limits of the Court, which amount will be more specifically stated prior to the submission of this case to the Jury; that he have interest on the judgment at the legal rate; that he recover costs of Court in this behalf expended, and that he have such other and further relief, both general and special, legal and equitable, to which he may show himself justly entitled and in duty bound will ever pray.

Respectfully submitted,

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/s/ Michael Y. Saunders
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Attorneys for Plaintiff

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

vs.

INGERSOLL-RAND CO. d/b/a
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

DEFENDANT'S ORIGINAL ANSWER AND SPECIAL EXCEPTIONS

[Filed August 16, 1984]

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Ingersoll-Rand Co., d/b/a Ingersoll-Rand Co. Construction Equipment Group, hereinafter called Defendant, and makes and files the following Original Answer to the Plaintiff's Original Petition as authorized by Rule 92 of the Texas Rules of Civil Procedure. Subject to said Answer, the Defendant also makes and files the following Special Exceptions to the Plaintiff's Original Petition as authorized by Rule 91 of the Texas Rules of Civil Procedure. In support thereof, the Defendant would show the Court as follows:

ORIGINAL ANSWER

I.

Defendant hereby makes and asserts a general denial as authorized by Rule 92 of the Texas Rules of Civil

Procedure to the allegations contained in the Plaintiff's Original Petition. Defendant denies each and every, all and singular, the allegations and statements contained in the Plaintiff's Original Petition and demands that the Plaintiff prove its case by a preponderance of the evidence before this Honorable Court and Jury.

SPECIAL EXCEPTIONS

Subject to the foregoing Original Answer, the Defendant urges the following Special Exceptions to the Plaintiff's Original Petition as authorized by Rule 91 of the Texas Rules of Civil Procedure.

I.

Defendant specially excepts to that allegation contained in Paragraph II of the Plaintiff's Original Petition wherein it is stated that "this cause of action arises out of a premature and wrongful termination of Plaintiff's employment by Defendant . . ." The Defendant specially excepts to this allegation because it is vague, general, unspecific and does not fully apprise the Defendant [sic] the proof it will be required to meet at the trial of this cause. Specifically, this allegation fails to identify or otherwise describe the nature of employment allegedly terminated by the Defendant, nor does it specify or describe how this alleged termination was in any way "premature and wrongful."

II.

Defendant also specially excepts to that allegation contained in Paragraph II of the Plaintiff's Original Petition wherein it is alleged that "this termination violated and breached a contract with, agreements with and promises to Plaintiff . . . ." Said allegation is vague, general, unspecific and fails to apprise the Defendant of the proof it will be required to meet at the trial of this cause. Specifically, this allegation does not identify or otherwise describe the terms and provisions of the alleged

"contract" made with the Plaintiff, nor does it specify the terms and provisions of the alleged "agreements with and promises to [the] Plaintiff. . ."

III.

The Defendant specially excepts to that allegation contained in Paragraph III of the Plaintiff's Original Petition wherein it is alleged that "Defendant's termination of Plaintiff was with unreasonably short notice, without good and reasonable cause, and/or done in bad faith" in that said allegations are vague, general, unspecific and do not fully apprise the Defendant of the proof it will be required to meet at the trial of this cause. More specifically, this allegation does not specify what notice was provided to the Plaintiff nor how said notice was "unreasonably short." Further, said allegations do not specify how Defendant's alleged termination of the Plaintiff was "done in bad faith."

IV.

Defendant specially excepts to that allegation contained in Paragraph III of the Plaintiff's Original Petition wherein it is alleged that "Defendant's actions and wrongs in this regard have resulted in damage and injury to Plaintiff." This allegation is vague, general, unspecific and does not apprise the Defendant of the proof it will be required to meet at the trial of this cause. Specifically, this allegation does not specify what "actions and wrongs in this regard" are being complained of, nor does it identify or describe in any [sic] the "damage and injury" allegedly done to the Plaintiff as a result of this alleged termination.

V.

Defendant specially excepts to those allegations contained in Paragraph IV of the Plaintiff's Original Petition wherein it is alleged that "Plaintiff has sustained a loss of income and commission, personal expense and in-

convenience, loss of employee benefits and profit sharing and retirement programs . . ." Said allegation is vague, general, unspecific and does not fully apprise this Defendant of the proof it will be required to meet at the trial of this cause. Specifically, these allegations do not state the amount of the losses complained of by the Plaintiff.

VI.

Defendant specially excepts to the allegations contained in Paragraph V of the Plaintiff's Original Petition wherein it is stated that "Defendant should compensate Plaintiff for his losses and injuries and damages . . . ." Said allegation is vague, general, unspecific and fails to apprise the Defendant of the proof it will be required to meet at the trial of this cause. Specifically, this allegation does not state the nature and extent of the alleged "losses and injuries and damages" the Defendant should be required to pay.

VII.

The Defendant specially excepts to that portion of Paragraph V of the Plaintiff's Original Petition wherein it is alleged that "Defendant should also be required to pay exemplary damages by virtue of their conduct and the circumstances surrounding this termination." Said allegation is vague, general, unspecific and fails to fully apprise this Defendant of the proof it will be required to meet at the trial of this cause. Specifically, this allegation fails to specify or describe the nature of the alleged conduct and circumstances "surrounding this termination" which would justify an award of exemplary damages.

VIII.

Defendant specially excepts to that portion of Paragraph V of the Plaintiff's Original Petition wherein it is alleged that "Plaintiff also seeks recovery of prejudgment interest and attorneys fees, and a reasonable and

just amount. Plaintiff's damages greatly exceed the minimum jurisdictional limits of this court." The Defendant specially excepts to this allegation because it is vague, general, unspecific and does not apprise the Defendant of the proof it will be required to meet at the trial of this cause. Specifically, these allegations do not state the specific amount of prejudgment and attorneys fees the Plaintiff seeks to recover, nor does it state the legal or statutory basis which would authorize the recovery of such interest and fees in this cause. Further, these allegations do not state the total amout of prejudgment interest and attorneys fees sought by the Plaintiff in this cause.

IX.

Defendant specially excepts to that portion of Paragraph VII of the Plaintiff's Original Petition wherein it is alleged that "your Plaintiff is entitled to recover damages from Defendant in an amount greatly in excess of the minimum jurisdictional limits of the Court, which amount will be more specifically stated prior to the submission of this case to the jury." This allegation is vague, general, unspecific and does not fully apprise the Defendant of the proof it will be required to meet at trial. More specifically, the Plaintiff has failed to state the specific amount of damages it seeks recovery of in this trial.

WHEREFORE, PREMISES CONSIDERED, Ingersoll-Rand Co., d/b/a Ingersoll-Rand Co. Construction Equipment Group, Defendant, respectfully requests that this Honorable Court take notice of the filing of these Special Exceptions and set same for hearing; and that, upon hearing same, that this Court enter an Order striking the Plaintiff's pleadings or requiring the filing of amended pleadings containing more specific information about the nature of the Plaintiff's claims and causes of action and the nature and extent of the Plaintiff's alleged damages. The Defendant also prays for such other and further

relief to which it may show itself justly entitled to receive.

Respectfully submitted,

GILPIN, MAYNARD, PARSONS,
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[Certificate of Service Omitted in Printing]

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

v.

INGERSOLL-RAND CO. dba
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

[Filed February 4, 1985]

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now PERRY McCLENDON, hereinafter called Plaintiff, still complaining of INGERSOLL-RAND CO. dba INGERSOLL-RAND CO. CONSTRUCTION EQUIPMENT GROUP, hereinafter called Defendant, and for cause of action and by way of amended Petition would respectfully show unto the Court and Jury as foliows:

I.

Plaintiff is a resident of DeSoto, Dallas County, Texas.

Defendant has been served with citation herein and has filed its Answer. Any further service will be effected on its attorney of record.

II.

This cause of action arises out of a premature and wrongful termination of Plaintiff's employment by De-

fendant on or about November 19, 1982. This termination violated and breached a contract with, agreements with and promises to Plaintiff, who had worked for Defendant for some nine (9) years and eight (8) months.

III.

Defendant terminated Plaintiff one (1) day after he was notified of same, without good and reasonable cause and/or in bad faith. Said termination was without good cause and in bad faith for the reason that Plaintiff had nine (9) years and eight (8) months of service with Defendant, which was four (4) months prior to the date his retirement and pension benefits with Defendant would have vested. Furthermore, Plaintiff would show that his job position was not eliminated but filled with another employee. Defendant's actions and wrongs as heretofore described have resulted in damage and injury to Plaintiff as hereinafter stated. Alternatively, Plaintiff would show that Defendant defrauded him of his pension and retirement benefits by terminating him four (4) months prior to his completion of ten (10) years of service. Plaintiff's termination was a willful and intentional act by Defendant.

IV.

As a consequence and result of Defendant's wrongful actions and breaches, Plaintiff has sustained a loss of income and commission, personal expense and inconvenience, loss of employee benefits and profit sharing and retirement programs, sleeplessness, nervousness and mental anguish and emotional distress. Plaintiff, therefore, seeks recovery in the amount of SEVEN HUNDRED FIFTY-THOUSAND DOLLARS ($750,000.00).

V.

Because of the above and foregoing, Defendant should compensate Plaintiff for the above losses, injuries and damages. Furthermore, as a result of the unconscionable and willful actions of Defendant in terminating Plaintiff

prior to the time that his retirement benefits had vested and awarding the sales territory he had developed to another individual without just cause, Plaintiff is entitled to recover exemplary damages in the amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00). Pursuant to Article 2226 of the Texas Revised Civil Statutes, it has been necessary for Plaintiff to employ the undersigned counsel to represent him in this case, for which he is entitled to reasonable attorney's fees, together with pre-judgment interest on the liquidated amount of damages sustained by Plaintiff.

VI.

At the time of his termination, Plaintiff was 45 years of age, with a life expectancy of 29.1 years according to the United States Life Tables, 1978, Volume II, Section 5, a certified copy of which will be used by Plaintiff as evidence in the trial of this case, and Defendant is hereby notified of said intent.

VII.

By reason of all of the above and foregoing, and on account of the injuries suffered by your Plaintiff on the occasion made the basis of this suit, your Plaintiff is entitled to recover actual damages in the amount of SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000.00) and exemplary damages in the amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00).

WHEREFORE, PREMISES CONSIDERED, your Plaintiff prays that the Defendant be cited in terms of law to appear and answer herein, and that upon final trial of this case, he have judgment against the Defendant for actual damages in the amount of SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000.00) and exemplary damages in the amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00); that he have interest on the judgment

at the legal rate; that he recover costs of Court in this behalf expended, and that he have such other and further relief, both general and special, legal and equitable, to which he may show himself justly entitled, and in duty bound will ever pray.

Respectfully submitted,

HELM, PLETCHER, HOGAN
BOWEN & SAUNDERS
2800 Two Houston Center
Houston, Texas 77010-1084

/s/ Michael Y. Saunders
MICHAEL Y. SAUNDERS
State Bar Number 17684000
W. ALLYN HOAGLUND
State Bar Number 09736500
Attorneys for Plaintiff

[Certificate of Service Omitted in Printing]

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

vs.

INGERSOLL-RAND CO. d/b/a
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

**DEFENDANT'S ANSWERS TO
PLAINTIFF'S INTERROGATORIES**

[Filed February 5, 1985]

TO: Plaintiff, Perry McClendon, by and through his attorney, Michael Y. Saunders, Helm, Pletcher & Hogan, 2800 Two Houston Center, Houston, Texas 77010

COMES NOW Ingersoll-Rand Co., d/b/a Ingersoll-Rand Co. Construction Equipment Group, Defendant in above-entitled and numbered cause, and files these its Answers to Interrogatories propounded by Plaintiff, Perry McClendon.

Respectfully submitted,

GILPIN, MAYNARD, PARSONS
POHL & BENNETT

By /s/ William T. Little
WILLIAM T. LITTLE
State Bar No. 12427100
1300 Post Oak Blvd.
Houston, Texas 77056
(713) 623-8800
Attorney in Charge for
Defendant, Ingersoll-Rand
Company d/b/a Ingersoll-Rand
Construction Equipment Group

[Certificate of Service Omitted in Printing]

ANSWERS TO INTERROGATORIES

1. The Defendant OBJECTS to this Interrogatory in that it is vague, general, broad and unspecific. Further, it requires the Defendant to review and evaluate the Plaintiff's pleadings in order to make a legal determination as to what facts are "relevant to any issue in this case." As such, this Interrogatory calls for information which is outside the scope of discovery as provided for by Rule 166b of the Texas Rules of Civil Procedure. Until the Plaintiff has filed amended pleadings in accordance with the Defendant's Special Exceptions, it will not be possible to provide a fully responsive Answer to this Interrogatory.

   Without waiving any part of the foregoing objection, the Defendant would provide the following list of individuals who have some knowledge of facts which may be relevant to some of the issues in this case: Mr. Warren J. Carroll, the Plaintiff's immediate supervisor during the period 1978—November of 1982; Mr. Fred Ferguson, Mr. Carroll's predecessor and the Plaintiff's immediate supervisor for mid 1978 to early 1981; Mr. Richard Olmen, immediate supervisor of Mr. Carroll and Mr. Ferguson during the period 1979 through November of 1982; Mr. Barry Uber, Mr. Olmen's predecessor; Mr. Roy Dueitt, the "inside sales and rental Manager" in daily contact with salesmen to provide them with administrative and technical support; Mr. Bob Bushman, service manager in charge of providing technical services to the salesmen; and Mr. Dick Jefferies, the salesman who took over the Plaintiff's territory after he was laid off in November of 1982.

2. At this time, the Defendant has neither consulted with nor selected any experts for consultation in connection with this case.

3. The Defendant has taken no written statements from anyone concerning this lawsuit.

4. The Defendant OBJECTS to the use of the term "terminate" with regard to the Plaintiff's separation from Ingersoll-Rand. As will become clear during the course of discovery in this cause, the Plaintiff was laid off. Mr. Warren J. Carroll, the Plaintiff's immediate supervisor, and Mr. Dick Olmen, Mr. Carroll's supervisor, discussed the layoff of the Plaintiff. Mr. Dick Niffin was also involved in consultations regarding this layoff.

5. The Defendant again OBJECTS to the use of the term "terminate" in this Interrogatory with regard to the circumstances of the Plaintiff's separation from Ingersoll-Rand. As previously stated, the Plaintiff was laid off. Mr. Warren J. Carroll made the "final decision" to lay the Plaintiff off.

6. The Defendant OBJECTS to Interrogatory No. 6 in that it does not seek to obtain access to any information which is relevant or material, nor does it seek to obtain access to any evidence which may lead to the discovery of relevant or material evidence. As such, the information requested in Interrogatory No. 6 is outside the scope of discovery provided for by Rule 166b of the Texas Rules of Civil Procedure.

7. Again, the Defendant OBJECTS to the use of the term "terminate" with regard to the separation of the Plaintiff from Ingersoll-Rand. As previously stated, the Plaintiff was laid off.

   Without waiving this OBJECTION, the Defendant would state that the decision to lay the Plaintiff [sic] was made by Mr. Warren J. Carroll based upon his review and evaluation of internal performance related documents and records, true and accurate copies of which have been separately provided to the Plaintiff in response to his Request for Production. The decision to lay the Plaintiff off was reached after counseling with the Plaintiff for several months and after consultation between Mr. Carroll and Mr. Olmen.

8. Once again, the Defendant OBJECTS to the use of the term "terminated" in this Interrogatory when referring to the circumstances of the Plaintiff's separation from Ingersoll-Rand. As previously stated, the Plaintiff was laid off.

   Without waiving this objection, the Defendant would provide the following information in response to this Interrogatory:

   Because of very poor market conditions in 1982 which had an adverse effect on Ingersoll-Rand, a company-wide effort was undertaken to reduce operating expenses. Part of this effort required a reduction in force with regard to employees. This reduction in force was accomplished on a company-wide basis and affected all divisions and branches and all levels of employment.

   With regard to the Plaintiff, management was requested to evaluate all salesmen in his branch and to make a determination as to who would be laid off based upon overall job performance.

   During the second half of 1982 and the first half of 1983, approximately eight (8) Ingersoll-Rand employees (including the Plaintiff) were separated from employment by means of lay off or early retirement.

THE STATE OF TEXAS)
)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared WARREN J. CARROLL, Vice President and Branch Manager of Houston—Ingersoll-Rand Equipment Sales, Houston Texas, and acknowledged that he has read the foregoing Answers to Interrogatories and the same are true and correct.

/s/ Warren J. Carroll
WARREN J. CARROLL
Vice President and Branch Manager—Houston—Ingersoll-Rand Equipment Sales, Houston Texas

SUBSCRIBED AND SWORN TO BEFORE ME on this the 5th day of February, 1985.

/s/ Barbara K. Roberts
BARBARA K. ROBERTS
Notary Public in and for the State of Texas

My Commission Expires: 8/14/85

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

vs.

INGERSOLL-RAND CO., d/b/a
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

DEPOSITION OF PERRY McCLENDON

February 5, 1985 Houston, Texas

* * * *

[26] Q. And how are they dependent?

A. I pay child support to them on a monthly basis, as well as some additional items of necessity.

Q. Do they live with their mother?

A. Yes, sir. They do.

Q. And what is her name?

A. Linda Ruth McClendon.

Q. When were you and Linda Ruth McClendon divorced?

A. In April of 1977.

Q. And how long have you and your current wife, Linda, been married?

A. Since November 5th of last year.

Q. November of 1984?

A. Yes, sir.

Q. When did you first come to work with Ingersoll-Rand, Mr. McClendon?

A. I started to work for them for the Air Power Division of Ingersoll-Rand August 1st, 1972.

Q. And what kind of work did you do for them when you commenced that employment?

A. I was a territorial salesman working with an end distributor that they had. And I also worked end users.

[27] Q. What do you mean when you say "end users"?

A. Well, a customer that represented Ingersoll-Rand's products that the independent distributor was not responsible for, sir.

Q. Is an independent distributor actually with other customers, like a middleman between you and someone else?

A. Yes, sir. Excuse me. Yes, sir. They bought air compressors from the manufacturer and sold them to their particular clientele.

Q. And how long totally did you work for Ingersoll-Rand before you were separated in November of 1982?

A. I worked for them until the 19th of February, 1977, that first—

MR. HOAGLUND: Do you understand the question?

THE WITNESS: Beg pardon?

MR. HOAGLUND: He asked you how long you worked for them prior to November, 1982.

THE WITNESS: I beg your pardon.

Q. (By Mr. Little) Your petition says nine years, eight months; is that right?

[28] A. Yes, sir. I thought you asked me how long I worked for them on that.

Q. I'm sorry. I may have been unclear. I'm interested in the total period of employment from 1 August of '72 until the time that you left in August of '82.

A. It's my understanding that I served with them for nine years, eight months and ten days.

Q. What kind of work, generally speaking, did you do during that period of time?

A. Well, I was a territorial manager, working with independent distributions that we have in the area and calling on certain contractors and clients that we as manufacturers needed to contact directly, sir.

Q. Were you a salesman during that period of time?

A. It did involve sales, yes, sir.

Q. Did you have the same kind of job during the whole tenure with Ingersoll-Rand?

A. No, sir.

Q. Okay. How did it change from the job that you just described for me?

[29] A. Well, the earlier assignment was more involved with direct sales to the end users. The latter assignment was more involved with an independent distributor network that we had working with their principals of their company and their sales personnel, and still doing some—some contacting of certain contractors for products that our independent distributors did not represent, sir.

Q. Now, you had a break in service sometime during those nine years, eight months and ten days; is that correct?

A. Yes, sir.

Q. Can you tell me about when that occurred?

A. Yes, sir. I left Ingersoll-Rand February 19th, 1977. And I was re-hired by them November the 28th, 1977.

Q. Why did you have this break in service in 1977?

A. Well, I wanted to return to Houston for personal reasons. And Ingersoll-Rand did not have any positions that were available for me in Houston. And so I left the company and did find employment in this [30] area, and in November of 1977 was re-contacted by them and re-hired for a suitable position.

Q. Did you do a different type of work during the second period with Ingersoll-Rand as compared to the work you did in the first period?

A. Slightly different, sir.

Q. Now, the first period in August of '72 to February of '77, where did you work, generally?

A. Okay. I hired on with the Air Power Group of Ingersoll-Rand in 1972 and was transferred to San Antonio the next year and was active in locating and setting up an independent distributor for covering of our products. I would say in October of 1975 I was hired by an Ingersoll-Rand company-owned operation in Dallas, and I did transfer in December of 1975 and served as a salesman for the company-owned branch until I left the company in 1977, on that February the 19th.

* * * *

[35] Q. Did you know Mr. Heath prior to coming back to work for Ingersoll-Rand?

A. Casually.

Q. And you had stayed in touch during this month to see if anything was going to come open in the sales area, in the Houston area?

A. Yes, sir.

Q. Who did you work for when you came back in 1977?

A. I reported to Bob Heath.

Q. Did you supervise any employees yourself?

A. No, sir.

Q. I take it you had a change in sales territory at the time?

A. Yes, sir. That's true. I had a territory that was defined as the Central and South Texas territory.

Q. And you were based out of Houston to service that territory?

A. Yes, sir. I was based out of Houston, but [36] in June of 1978 I moved to San Antonio, which put me in the heart of my territory, sir.

Q. Did you stay in San Antonio until you left the company in November of 1982?

A. No, sir. I was transferred to the Dallas territory December 29, 1979.

Q. Did your job change at that time?

A. To some degree. We had a better distributor network in that territory, and so it did change. And some of the products I represented changed slightly.

Q. In the past it had been stationary air compressors. What additional products did you start handling when you moved to Dallas?

A. Okay. Well, with this assignment that I mention that started in November of 1977, we were handling what was defined as a Construction and Mining Group products, which included products such as portable air compressors, compaction equipment, rock drills, handheld demolition equipment, equipment such as that, sir.

* * * *

[60] Q. That would be like a year-end sale at the department store or something like that?

A. Yes, sir.

Q. Something that you really couldn't anticipate at the start of the year?

A. That's true, sir.

Q. So other than the Compensation Arrangement, there was no other document as to compensation and commission structure?

A. That's correct, to the best of my recollection, sir.

Q. Okay. Were there any other agreements or contracts or documents that you signed or were furnished that addressed other aspects of your employment with Ingersoll-Rand?

A. Well, there were certain company programs or benefits, if you are referring to those, [61] sir, that are available in pamphlets or one thing or another that define programs, such as profit sharing or retirement benefits, but no written document that I had to sign, sir.

Q. Okay. Was the Compensation Arrangement the only document that you were ever presented by Ingersoll-Rand and requested to sign that concerned any aspect of your employment with the company? When I ask that question, I'm not interested in documents such as withholding certificates that you might sign for payroll or

applications for insurance coverage, things of that sort. I'm talking about any other document concerning the guarantees, warranties, representations that might have been made to you or list of your obligations that you had to sign while you worked with the company.

A. There was a form that dealt with ethics and good, honest business tactics that we did sign at some time back, but that's the only thing that I can recall at all.

Q. Did you sign that on just one occasion?

A. I can just recall one occasion, sir.

* * * *

[75] Q. Do you recall if you received any such commission checks at any time during the year 1982?

A. Yes, sir. I received several.

Q. Do you recall if you received any commission checks during the year 1981?

A. Yes, sir. The majority of the months.

Q. Okay. So it was possible for you to earn a commission on the sales that you were generating on a month-to-month basis even if you didn't meet your quota for the entire year?

A. Yes, sir. That's correct.

Q. Okay. Now, you only worked through the middle of November of 1982; that was a month and a half short of an entire year.

A. Through November 19th, sir.

Q. Okay. I asked you a question a moment ago about whether or not you made your quota for 1982 and you answered no. Was that because you only worked ten and a half months in 1982?

A. That would be partly correct, but 1982 was a [76] devastating year for our particular industry.

Q. What do you mean when you say "a devastating year"?

A. Well, there were trends in the marketplace that made us not be able to achieve what we had hoped to achieve.

Q. Were there other salesmen that you knew about in your branch that were not meeting their quotas in 1982?

A I wouldn't know specifically, sir.

Q. You were having trouble, though, nonetheless, in 1982?

A. Well—

MR. HOAGLUND: Meeting his quota?

MR. LITTLE: Yes.

THE WITNESS: I was not on target to meet that quota.

Q. (By Mr. Little) Do you know how close you came in terms of percentage?

A. No, sir. I do not recall the percentage.

Q. Do you attribute, then, as one of the reasons you were unable to meet your quota in 1982 to this bad market or devastating [77] financial effects that you referred to a moment ago?

A. Partly that, and the other part being that the year '81 had been a very respectable year for us. And a lot of the dealers had ordered late in that year, which affected their need to re-order for 1982.

Q. Were you encouraged by your supervisor at Ingersoll-Rand to try and meet your quota or exceed it every year?

A. Certainly so.

Q. What happened at the end of the year when you weren't able to meet or exceed your quota?

A. Well, you know, they would look at your territory and go over the numbers and see why you weren't able to achieve what you had, what you were allocated for the year.

Q. Would that result in any sort of change in the quota that you were given for the following year?

A. It could, sir, depending on the reason for the lack of business.

* * * *

[81] Q. Are you saying to me, then, that you may have talked about it but nothing got changed?

A. The managers had the ability to massage those numbers or change them if something devastating happened to your territory, if distributors cancelled or something. So really, the numbers that appear on there are not ironclad and unchangable.

Q. Did you ever ask anybody to change your numbers for the year 1982?

A. I don't recall having done so.

Q. Okay. Now, again, you referred to 1982 as a devastating year. Are you talking about a devastating year for your branch at Ingersoll-Rand or for the whole company or what?

A. I'm talking about the compressor industry, which was mainly what we were involved with. And due to some circumstances in the marketplace, it just—it just did not enjoy the year that typically we would.

Q. Were customers that you had previously been getting orders from just not placing orders in 1982?

[82] A. Yes, sir. Both distributors and end users that weren't certain of the economy; the recession hit, and they just weren't ordering new equipment.

Q. Was that reflected in the commissions you were paid in 1982?

A. Yes, sir.

Q. Do you know if that was a common experience of the other salesmen working in your branch at Ingersoll-Rand during 1982?

A. I wouldn't know, sir.

Q. You didn't ever talk to them about it?

A. Not about their income.

Q. Do you know what other effects the general market conditions in 1982 had on Ingersoll-Rand?

A. Well, sure. It was very hard on them, depending on which division you are talking about, which product. But I don't know the end results throughout the respective group, sir.

Q. Let me make it more specific. Do you know what effects, if any, 1982's bad market had on your branch, your division of Intersoll-Rand and your product line?

[83] A. Yes, sir. The demand for our products was such that they were so limited that the company had to let some people go.

Q. Do you know about how many people were let go during 1982 as a result of these market conditions?

MR. HOAGLUND: In his area?

Q. (By Mr. Little) In your branch and division of Ingersoll-Rand.

A. I don't know the exact number, sir.

Q. Do you recall the names of anybody that might have been let go in your branch at this time?

A. Oh, there were some people in our office staff, some of our mechanics, people like that. I don't know that I recall all of their respective names.

Q. Did you ever have occasion to meet with or talk with any other salesmen in your branch in 1982 about how their business and how their customers were doing?

A. We would meet at meetings that we had. However, we did kind of hold back our meetings in 1982 because the budget was [84] hard-pressed for that kind of thing. But it was common knowledge that the business trend was very bleak.

Q. Did anybody at Ingersoll-Rand ever inform you about what steps were being taken to meet these economic problems in 1982, specifically within your branch and division?

A. Well, you mean what actions they were taking to try to amend that?

Q. Yes, sir.

A. Well, Mr. Carroll informed myself, as I presume he informed his entire staff, that he would receive mandates to reduce the size of his force.

Q. When did he first discuss that with you?

A. Oh, let's see, sir. I suspect probably approximately the middle part of the year. I don't know that I could state an exact month, sir.

Q. Summer of 1982?

A. That would be accurate, sir.

Q. And how did that particular discussion come about?

A. Well, you know, we would call the office and [85] there would be fewer people there or Mr. Carroll would be in my territory and we would discuss the, you know, the business in general and the fact that various people were having to leave the company. And it was, you know, it was looking very serious.

Q. Can you recall about how many times you had occasion to talk to Mr. Carroll about this particular problem during 1982?

A. Well, I would say we traveled extensively through my territory on a couple of times and that was the subject that we discussed, you know, at great lengths, probably multiple times, three or four. I don't know the exact number, sir.

Q. When you say "traveled together," he would physically go with you into your sales territory?

A. Yes, sir.

Q. Would it be on a call to a customer, on a trip to see a customer, or what?

A. A call to go conduct business with one of our distributors in the territory or to call on some potential clients.

Q. Did he ever—when I say he, I mean [86] Mr. Carroll—did Mr. Carroll ever discuss with you in 1982 the possibility of laying off any salesmen doing the kind of job that you were doing?

A. Yes, sir. It was understood that probably some number of sales personnel would have to be relieved of their job.

Q. Do you recall when that specific conversation might have taken place?

A. I don't recall the exact month, sir. But it was probably September or something like that.

Q. This would be September of 1982?

A. Yes, sir.

Q. Okay. And, again, what might have been the occasion for that conversation?

A. Well, whenever I had the regional manager in my territory, I would want to find out as much as I could about the business trend, how the factories were going, how the region was going. And we would discuss the fact that—and we did, in fact, discuss the fact that personnel had to be let go down there.

* * * *

[92] Q. Can you tell me what time period you are talking about you had these conversations?

A. He just—well, he would share with me whatever knowledge he had. But as far as knowing just when they would call him and tell him to let people go, he made no special claim about that.

Q. When is the last conversation that you had with Mr. Carroll concerning your sales quota and whether or not you would be laid off?

A. Well, again, I don't think we talked much more about quotas at the time of the year because we knew that it was a disastrous year.

Q. So in the fall of '82 the handwriting was on the wall; quotas were just out the window?

A. Yes, sir. And that certain numbers of people would no longer be employed by Ingersoll-Rand.

[93] Q. And it just became a matter of who and when?

A. I think that's a safe appraisal.

Q. Okay. When were you notified that you were one of the individuals to be laid off?

A. On November the 18th.

Q. And who notified you?

A. Mr. Carroll, by telephone.

Q. The layoff was to be effective when?

A. The next day.

Q. On the 19th of November?

A. Yes, sir.

Q. Tell me what he said to you in the conversation.

A. Well, I was talking to him about business in general, and he interrupted me asking me if I was sitting

down. And then he informed me that he was going to have to let me go and that the next day, the 19th, would be my last day. And he apologized and gave me specific instructions about taking my company car to a location for him to pick it up, hopefully the next day.

Q. What was your response?

A. I asked him if there was going to be any kind of severance pay or any—we had [94] discussed things like that, the company negotiating length of time with the company. And as I recall, his comment was that he would—that I would be receiving two weeks' pay, which I interpreted as being my vacation pay. And that's about all that I recall.

Q. Do you recall a specific discussion about whether or not you would receive a severance pay, and if so, in what amount?

A. I recall a conversation where Mr. Carroll told me that a lot of people around the country had been let go from the firm and that a lot of them had a lot more time and service than myself, and that the company was taking that into consideration and that likely there would be some form of compensation—excuse me—compensation that would take into account your length of time with the company.

Q. Were you ever given any severance pay?

A. I was given the two weeks' pay, which I kind of interpreted as being my vacation pay that I came within one month of earning. And I did receive three more commission checks, [95] sir.

Q. Do you receive all of the commission payments that you felt you were entitled to as of the 18th of November, 1982?

A. As of the 18th of November?

Q. Yes, sir.

A. It's my understanding that—you mean as of that date or I was entitled to effective that date? Excuse me.

Q. Let me clarify. That's fine. Let's assume that the 19th of November, 1982, was your last day at work.

Now, you had earned some commissions through that date which hadn't been paid to you as of that time?

A. Yes, sir.

Q. Is it your understanding that you were paid all of the commissions that you had earned through the 19th of November, 1982?

A. Yes, sir. It is my understanding that they did pay me the commissions that I was entitled to, based on the compensation agreement.

Q. So you have no dispute at this time that you have not been paid any commission that you might have earned?

[96] A. No dispute with that, sir.

Q. Okay. Did they make any kind of accommodation with regard to insurance coverages?

A. I believe they left that in effect for an additional 30 days.

MR. LITTLE: Mark that as 8.

(Defendant's Exhibit No. 8 was marked for identification and is attached hereto.)

Q. (By Mr. Little) Mr. McClendon, I will show you a document which has been marked for identification as Defendant's Exhibit No. 8 and ask you if you can identify that for me.

A. It's a form that's labeled "Salaried Personnel Change Authorization."

MR. HOAGLUND: Have you ever seen that form before?

THE WITNESS: I don't recall having seen it.

* * * *

[99] Q. Okay. What kind of response did you get when you made those inquiries to Mr. Carroll?

A. Well, he was very encouraging. Nothing had really changed in his region. One occasion he mentioned being aware of somebody that might be looking for somebody.

Q. Was he ever able to promise you that you would be re-hired as of a specific date?

A. No, sir.

Q. Was anybody else ever able to do that for you?

A. No, sir.

Q. When Mr. Carroll called you on the 18th of November, 1982, did he discuss the possibility with you of re-assigning you to another job at another branch somewhere else in the company?

A. No, sir. That was not discussed.

Q. Did you ask him about that possibility?

A. No, sir. We did not discuss that.

Q. Is there any reason that you didn't ask him [100] about the possibility of re-assignment within the company at that time?

A. Well, they were letting off vast numbers of individuals from Ingersoll-Rand. And many people had much more seniority than myself. So I don't recall any conversation that gave any hope towards being transferred to some other group.

Q. I take it, then, that you had enough information about the state of the company to reach a conclusion in your own mind that a re-assignment was not feasible, due to the poor performance of the company in 1982 and the need to make other layoffs?

A. Yes, sir. I understood that.

Q. On any of those subsequent occasions, that is, after the 19th of November, 1982, when you spoke with Mr. Carroll or other people at Ingersoll-Rand, did you discuss the possibility of coming back to work in another capacity?

A. I think I would use terms like, "Is there anything in the area that I might be considered for that my qualifications would meet," things, you know, vague terminology, [101] sir.

Q. You would have considered employment with Ingersoll-Rand after the 19th of November of 1982 in another capacity, then?

A. Yes, sir. One that would enhance my needs and their needs.

Q. What kind of job besides working in a sales area would you consider yourself qualified to handle for Ingersoll-Rand?

A. Well, I would say that I would listen to anything that they would have had in marketing, or there were some conditions under which I would have done anything to have completed my time, some additional time with them in some capacity that would have met both of our needs.

Q. What do you mean when you say "complete your time with Ingersoll-Rand"?

A. Well, I would have liked to have completed the ten years of service which would have effected my profit sharing and my possible retirement with the company. . . .

* * * *

[108] Q. Okay. We had just spoken a moment ago about retirement. I believe you told me that it was your understanding that an employee with more than ten-years' service had vested a right to some sort of retirement income; is that correct?

A. Yes, sir.

Q. What is your understanding of your rights as an Ingersoll-Rand employee with ten-years' service to a retirement program?

A. Well, it's my understanding—and I have sent documents that cover that—again, it's my understanding that with ten-years' service and based on some formula that they use for some period of your income, that at age 55 or 65 at some point in time, sir, you are qualified for some financial benefits on a retirement-type program.

Q. Is it your understanding that you actually [109] have to retire from Ingersoll-Rand before you receive any of this money?

A. I don't know of anyone that gets it that's still employed by them.

Q. So you have to have at least ten years in?

A. I think that's the minimum, sir.

Q. You have to retire and you have to be a certain age before you are paid any portion of this money?

A. Yes, sir. That's my thought.

Q. And your understanding is that the amount of money that you are paid in retirement is determined by a formula applied to your salary while you are actually working at Ingersoll-Rand?

A. Yes, sir.

Q. Do you have any idea of what amount of money you are talking about in your case?

A. I do not know exactly, sir. But on a monthly basis —I do not know, but I know it's more than I have if I don't get it.

Q. Is it your understanding that had you left Ingersoll-Rand with more than ten years of service that you would have been entitled to the payment of this retirement even if you [110] retired from another job after working for an additional period of time?

A. I don't know the answer to that, sir. I don't know if working somewhere else would have eliminated me from receiving that from Ingersoll-Rand. I would assume that it does not.

Q. The only information you have about the retirement program is what's contained in the documents that you have provided us with?

A. Yes, sir.

Q. Okay. At the time Mr. Carroll called you up and told you that you were being laid off, did you discuss the matter of your benefits with him? And by that I mean, did you discuss your contributions to the savings plan or your retirement?

A. We did not. There is a vague chance that he mentioned that they would extend the insurance for an additional month or for some time frame, but other than that, we did not discuss—when I asked him about would

there be any severance pay or separation pay as we discussed in the past, he said two or [111] three weeks.

Q. Did you ever have at any time a discussion with Mr. Carroll about those benefits that we have talked about here, the profit sharing and the retirement?

A. I don't think we did, sir.

Q. Do you remember having any discussions at any time from the date you were laid off forward with anybody at Ingersoll-Rand about your interest in the profit sharing plan or your interest in the retirement?

A. No, sir.

Q. Besides the retirement and the savings we have talked about, are there any other benefits that you feel you have been deprived of as a result of being laid off?

A. Well, again, I understood that they would probably take in time—excuse me— in consideration [of] the length of time I had been with the company, I seem to recall that Mr. Carroll mentioned that they had some formula where they would give you a week or two-weeks' pay, something to that effect, for each year's service; that they were trying to do something honorable about the [112] fact that they had to let a lot of people go.

Q. So you are talking about here the possibility of some one-time payment of an amount to be determined based on seniority and things of that sort to partially compensate for the fact that you were being laid off?

A. Well, I did not know and still do not know any formula that they have. But I was of the opinion that they would again take into consideration—I didn't know if they give you one lump sum or say, "Hey, you are so close to ten-years' service, when you get 55 you will qualify for this." I didn't know what they were doing. We did not discuss that, sir.

Q. Okay. Do you know if you have ever received any payment of that sort?

A. No, sir. I have not received any payment like that.

Q. Other than those conversations with Mr. Carroll and other people at Ingersoll-Rand, have you exchanged

any correspondence with anybody at Ingersoll-Rand since the [113] date you were laid off?

A. Not regarding these subjects.

Q. Have you exchanged correspondence with anybody at Ingersoll-Rand on any subject?

A. No, sir. Not exchanged correspondence.

Q. Do you ever remember at any time going up to anybody at Ingersoll-Rand since 19 November, 1982, and saying, "I'm just a few days short of my retirement; why can't I stay on until I vest?"

A. Well, I thought—I thought that my position had been terminated and they didn't have anything for me to do; my job had been eliminated and there was no—I didn't know of any method that I could stay on.

Q. Okay.

MR. LITTLE: Why don't we re-mark this First Amended Original Petition as Defendant's Exhibit No. 9.

(Defendant's Exhibit No. 9 was marked for identification and is attached hereto.)

* * * *

[125] Q. You don't know if people have been forced to take on more work because you have the same amount of business and fewer employees to take care of it?

A. I have no idea about that, sir.

Q. Okay. I would like to give you an opportunity to review Roman numeral III of Plaintiff's Exhibit No. 9 and I have some questions for you about that.

A. Okay.

Q. Mr. McClendon, have you read through paragraph III of your petition that's marked as Defendant's Exhibit No. 9?

A. Yes, sir. I have.

Q. Okay. Reference is made in the second sentence there that said termination is without cause and in bad faith. Is it your position that you were laid off by Ingersoll-Rand simply to deprive you of your benefits

that you have discussed here with us, the savings and the retirement?

A. No, sir. It is my position that my assignment was not eliminated, apparently, and that some other individual, at some [126] expense, was transferred to that area to take that assignment, and while it is true me being let go at that particular time frame does apparently cost me those benefits that I would have been entitled to with four more months of service, sir.

Q. Did anyone tell you you were being laid off because your position was being eliminated?

A. No, sir.

Q. What information do you have to support the allegations in this paragraph that your termination was allegedly willful and intentional and constituted fraud so as to deprive you of your benefits and your retirement benefits?

A. I think those facts speak for themselves. If I had had ten-years' service I would have qualified for those other programs, which would have benefited me.

Q. They would have been paid to you?

A. At some point in time, if we are talking about the retirement.

Q. Okay.

A. So that does translate to a savings for the company and nothing for me, sir.

[127] Q. Are you aware of any specific document that's in existence that says "we should let Mr. McClendon go because if we don't we will have to pay him retirement and we will have to pay him his profit sharing contributions"?

A. I'm not aware of any document; that's why I'm seeking a judge or jury to rule.

Q. Okay. And are you aware of anybody that said that to you, on behalf of Ingersoll-Rand, that "we are letting you go because we don't want to pay you this

money that you might become entitled to in a few more weeks"?

A. No one has said that, sir. But the fact remains that the effect will be the same.

Q. What you are doing is you are saying "I was let go with nine years, eight months and ten-days' service; if they would have kept me a little bit longer I would have been entitled to it. Since they didn't keep me I don't get it, therefore I have been defrauded of it." Is that your position?

A. That's basically my position. I could have earned it on my own if they had shown the [128] compassion; that my position was not eliminated. I would have earned it on my own, sir.

Q. Because your position was not eliminated you felt you could have stayed on at least long enough to qualify for those benefits?

A. Yes, sir. Again, if I had been an engineer for one of our factories and they shut down the whole factory and let go 1,000 people, that would be different. But that's not the case, sir.

Q. Are you aware of anybody else that was let go in late 1982 or early 1983 under similar circumstances?

A. I wouldn't know the exact details of their circumstances, sir. But obviously a lot of people were let go.

Q. Okay. No specific individual comes to mind who was either fired or laid off or something of that nature this close to vesting in these benefits?

A. None that I would know specifically about, sir.

* * * *

[146] Q. Are you aware of any documents that would exist anywhere which would outline this decision to single you out and terminate your employment so as to deprive you of your retirement benefits, anything like that?

A. I'm not aware of any documents to that effect, sir.

Q. Are you aware of anybody at Ingersoll-Rand that might have wanted to accomplish that goal?

A. Well, you know, again it becomes a business decision. Some manager or his boss has to decide if they have got to let some people go. They decide which one to let go and which one to keep.

Q. Is it your position that one—in this lawsuit, that one of the reasons they decided to let you go as opposed to anybody else is because you were so close to vesting in these retirement benefits and profit sharing plan?

A. Well, it would sure make you wonder, sir. But somebody else will have to come up with [147] that answer. I don't know.

Q. Right now all you can do is guess about that?

A. The savings are reflected that, you know, they will benefit by that, sir.

Q. Again, Mr. McClendon, I don't mean to argue with you at all. I'm just trying to understand what information you might have to lead to that conclusion. And if all it is is a speculation on your part, then that's what I need to know. If somebody has told you that or handed you a letter saying that, then I need to know about it. That's what I'm asking about here now.

A. It is my opinion and my thinking that in the act of letting me go to give my assignment to someone else, surely they should have been aware that that represented a nice savings to the company. And I mean, that's just a fact. And I feel like having served them for that period of time that that should have been dealt with. And because I'm not sure, that's why I'm going to a third party for their ruling on that issue, sir.

[148] Q. Okay. Your position basically is they can save more money by laying you off as opposed to somebody else who is not as close to retirement or vesting in these rights and benefits?

A. It did have that effect, sir.

Q. And again right now nobody has told you that that's why you were laid off and you are not aware of any specific facts; it's just your conclusion or your point of view from looking at the facts that are available to you at this time?

A. Yes, sir. I have no document where somebody can say there is a conspiracy or anything like that, sir.

* * * *

INGERSOLL-RAND

SALARIED PERSONNEL CHANGE AUTHORIZATI(

CONFIDENTIAL

(See reverse side for instruct

☐ EMPLOYMENT ☐ MERIT INCR ☐ PROMOTION ☐ TRANSFER ☐ TERMINATION ☒ OTHER

DATE PREPARED: 11 - 18 - 82 (mo day 19)

EFFECTIVE DATE: 11 - 19 - 82 (mo day 19)

PRESENT STATUS (Complete For All Changes)

Last	First	Middle Initial	EMPLOYEE NO	DIV/ACCOUNT NO
McClendon	Perry	M.		15-028

☒ Exempt ☐ Non Ex.
☐ Regular ☐ Tempor
☐ Direct ☐ Indirect
☐ Off & Admin ☐ Eng

JOB TITLE: Distributor Representative II

JOB DESCRIPTION NO:

DAILY TIME CARD: ☐ YES ☒ NO

LOCATION (Div Dept Branch): CEG Houston

EDUCATION: ☐ H S or LESS ☐ 2 YR TECH ☐ 4 YR ENGINEERING ☐ 4 YR COLLEGE (Other Than Engr) ☐ MASTER ☐ PH D

SOCIAL SECURITY NO: 457 : 56 : 1092

NET DATE STARTED (Re): 8 - 1 - 72 (mo day 19)

EMPLOYMENT
☐ NEW HIRE
☐ RETURN ☐ RE-HIRE

HOME ADDRESS: Street No & Name / City / State / Zip

DATE OF PREV SEPARATION: mo day 19

BIRTH DATE (mo day 19)	MAR STATUS	CITIZEN	SALARIED PERS REQ NO		PERSON REPLACED
				☐ REPLACEMENT ☐ ADDITION TO FORCE	

TRANSFER OR OTHER JOB CHANGE

☐ JOB REVISION
☐ TRANSFER FROM HOURLY
☐ TRANSFER – Explain Under Remarks

NEW JOB TITLE	NEW JOB DESCRIPTION NO	NEW DIV-ACCOUNT NO	☐ Exempt ☐ Non-Ex.
NEW LOCATION (Div Dept Branch)	REPLACEMENT REQUIRED ☐ YES ☐ NO	DAILY TIME CARD ☐ YES ☐ NO	☐ Regular ☐ Tempor ☐ Direct ☐ Indirect ☐ Off & Admin ☐ Eng

TERMINATION

☐ RESIGNATION ☐ RETIREMENT ☐ REDUCTION IN FORCE ☐ DISCHARGE ☐ DEATH ☒ OTHER – Explain Under Remarks

VACATION AUTHORIZED	VACATION TAKEN	CONTINUE SALARY PAYMENTS UP TO AND INCLUDING	VACATION DUE	TERMINATION PAY	REPLACEMENT REQU
2 (wks)	1 (wks) 0 (days)	~~11 - 30 - 82~~ (mo day 19) plus	1 (wks) 0 (days) plus	3 (wks)	☒ YES ☐ NO

SALARY OR SALARY CHANGE — Evaluation Pts

☐ NO CHANGE

PRESENT SALARY: $ ____ Per ☐ Wk ☐ Twice a Mo ☐ Mo ☐ Yr

PROPOSED CHANGE: $ ____ % Per ☐ Wk ☐ Twice a Mo ☐ Mo ☐ Yr ☐ MERIT ☐ PROMOTION ☐ ADJUSTMENT ☐ OTHER – Explain Under Remarks

PROPOSED SALARY: $ ____ Per ☐ Wk ☐ Twice a Mo ☐ Mo ☐ Yr

PAID BY (FACILITY)

RATE RANGE: ☐ Wk ☐ Twice a Mo ☐ Mo ☐ Yr
MIN $ ____
MID $ ____
MAX $ ____

LAST CHANGE: $ ____ % Per ☐ Wk ☐ Twice a Mo ☐ Mo ☐ Yr
DATE (mo day 19)
☐ MERIT ☐ PROMOTION ☐ ADJUSTMENT ☐ OTHER – Explain Under Remarks ☐ GEN INCREASE

SALES

WILL OPERATE COMPANY CAR: ☐ YES ☐ NO

COMPENSATION DETAILS –

Jan 3/83 PK

RELOCATION EXPENSES

RELOCATION EXPENSES	ESTIMATED COST	CHARGE TO (Location)	DIV ACCOUNT NO	AUTHORIZED BY
☐ YES ☐ NO				

REMARKS (If more space is required attach a separate sheet)

This is a lay off due to the economic conditions of the day. Perry will receive three (3) weeks termination pay plus his due vacation and all commissions that are due him until the effective date, 11-19-82. We will continue to cover him and his family on our medical and hospitalization plan until ~~the end of 1982~~. Jan 31, 1983 per REK 12/3/82

Will advise on health Ins.

APPROVALS (Name & Dept)

	DATE		DATE
[illegible]	11/15/82	[illegible]	11/22/82

SALARY COMMITTEE: 12 Jan 83 LUC REK FM

FINAL APPROVAL: DATE

DEFENDANT'S EXHIBIT 2-3-85 NO. 8

46

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

vs.

INGERSOLL-RAND CO., d/b/a
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

DEPOSITION OF WARREN J. CARROLL

February 5, 1985 Houston, Texas

* * * *

[25] Q. And for sales personnel such as Mr. McClendon, he would be one that would be involved in going around and attempting to sell Ingersoll-Rand's products to distributors or people that were in need of an end use of those products; is that correct?

A. Yes.

Q. He would not be involved in the sale of products from the company store?

A. There was some crossover there. There would be a situation where there might be a customer that we would determine we would have to sell direct on a piece of used equipment that maybe one of his distributors would want to buy, and it would be purchased through the store.

Q. But I mean he wouldn't be located physically in this store and be expected to sell like you were over at Foley's or something?

A. No.

Q. Now, how many salesmen did you have that worked for you in this C & M Group here in Houston during 1981?

[26] A. You need to explain that. The total number of salesmen that worked for me in this organization I had?

Q. Yes, sir.

A. Okay.

Q. I mean, is describing it the C & M Group a fair way to do that?

A. I had six—right—I had six salesmen and one sales manager.

Q. Who was the sales manager?

A. Dick Jeffries.

Q. Who did he report to?

A. Me.

Q. Who reported to him?

A. Three salesmen of the six.

Q. Who were those salesmen that reported to Mr. Jeffries?

A. Dan Jones, John Cagel, and Tom Matthews.

Q. Are any of those gentlemen currently employed by Ingersoll-Rand?

A. Dan Jones is.

Q. The other two are not?

A. No, sir.

Q. When was Mr. Cagel terminated?

A. Mr. Cagel?

* * * *

[38] Q. So none of your superiors had anything to do with the decision to lay off Mr. Reese; is that right?

A. No. The only part they play in it is business was going down; you've got to do something. That's in a normal day-to-day conversation with my boss, but the decision lies with me.

Q. Well, what guidelines did you receive from your supervisory personnel, sir, as to what you were to do with the sales personnel that were under your supervision?

A. General guidelines of good management.

Q. Well, I mean did they tell you at some point in time, "Look, Mr. Carroll, things are bad and we are going to have to get rid of 50 percent of your staff"? Did they tell you something like that?

A. Indirectly, yes, but not at 50 percent. We talked about how we would manage it, what we have to do, total expense money and how you are going to run the branch. That is an ongoing thing with your superiors. How you do it is really up to the individual.

Q. Well, did they ever provide you with any [39] guidance as to the number of employees that were under your supervision that were to be let go?

A. An exact number?

Q. Yes, sir.

A. I don't remember them saying an exact number.

Q. Well—

A. It relates to dollars and cents and so, you know, they probably did say, okay, that probably would mean five or four or eight or three. But, you know, it's not a direct order to lay off five people.

Q. Because what they are really concerned with was the bottom line whether or not you are making any money in your group?

A. That's correct.

Q. So from the standpoint of an individual, they didn't care how many individuals that you had working for you; they just wanted to know whether or not your group was producing a profit; is that correct?

A. That's correct.

Q. So if your branch was performing to such an extent that it was having tremendous loss, [40] as far as they were concerned, you could get rid of everybody in the branch, theoretically; isn't that right?

A. That's right.

Q. So that leeway and the determination as to how to best budget and run your operation was left to you; is that right?

A. Yes.

Q. And if they weren't satisfied with the way that you were doing it, then obviously they would see that somebody else filled your position; is that correct?

A. That's correct.

Q. And so you obviously wanted to do everything that you possibly could to insure that you protect[ed] your position and also to look out for the best interests of your people; is that correct?

A. That's correct.

Q. And make a profit for the company from your operations?

A. Yes.

Q. Is Mr. LaBlanc still employed by Ingersoll-Rand?

A. Yes.

* * * *

[52] Q. So you asked that he transfer to the Dallas area?

A. That's correct.

Q. And he did?

A. Yes.

Q. From the time that he moved to Dallas until the time that he left the employment of Ingersoll-Rand, were you satisfied with his job performance?

A. Yes.

Q. You don't have any complaints about that?

A. Well, general complaints about any salesman, but it was adequate. He did a fair job in doing his job.

Q. Okay. There wasn't anything where he was doing something on the side that in any way made you feel like he was being disloyal in any way to his employer, Ingersoll-Rand?

A. Not that I know of. The only thing that people had told me, he was involved in the [53] Amway thing, which I did not find out from him until later. But that's,

you know—as long as—I kept thinking, well, as long as the business came in, that didn't bother me.

Q. Did you ever have any discussions with him in that respect?

A. Yes. Finally during that last year, 1982.

Q. What was the nature of those discussions?

A. He was telling me about it.

Q. Were you satisfied with the way that he was acting as a salesman on behalf of Ingersoll-Rand during that period of time?

A. During 1982?

Q. Yes, sir.

A. Yes.

Q. I mean, understanding the market conditions.

A. Yes.

Q. So would it be fair to say to this jury that there is not anything that you can pinpoint and say, "We feel that Mr. McClendon was deficient in this area"; is that correct?

A. Well, if you wanted to outline every single thing, I mean, you could say each salesman—Perry might not have done reports as well as another one and things [54] like that, which we discussed continually during his performance, but if you take everything, it was a fair performance.

Q. He gave an overall good performance for his employer; is that correct?

A. Yes.

Q. He was a good employee?

A. Yes.

Q. Now, who made the determination to terminate Mr. McClendon?

A. I did.

Q. And did you receive any guidance whatsoever from any of your superiors with respect to that particular decision?

A. Other than like I said before, in general, not particular.

Q. Okay. In other words, I just wanted to be sure I understand the facts of the situation. Your immediate boss, Mr. Olmen, or his immediate boss, Mr. Wendel, did not call and say, "Perry McClendon has got to go"?

A. No.

Q. Okay. So once again, it was based upon your determination of what you felt was best for [55] the company; is that correct, in your position as branch manager?

A. That's correct.

Q. And you made the determination that because of the considerations you had to make that Mr. McClendon's position—not his position—but that he should no longer be an employee of Ingersoll-Rand; is that right?

A. Right.

Q. Okay. And at that time, you were aware of the amount of tenure that he had with Ingersoll-Rand, were you not?

A. No. That did not come into play. I guess I should have looked it up, but I didn't.

Q. Well, I mean, clearly, that wasn't any secret, was it?

A. No.

Q. I mean, all you would have to do was look in his personnel file and you could have determined how long he had been an employee of Ingersoll-Rand, could you not?

A. Right.

Q. Or you could have asked the personnel office as to what the amount of his longevity with the company was at that time, could you not?

[56] A. Yes.

Q. You chose not to do so? Is that what you are saying?

A. I didn't choose. That just never even crossed my mind.

Q. You just didn't even think of that?

A. That wasn't part of the decision in analyzing which salesmen stayed and which one left.

Q. Have you told me about all the salesmen within your group that were laid off by Ingersoll-Rand during 1982?

A. To my knowledge. I covered—well, Perry and Tom Reese. And Tom Matthews left on his, you know, just resigned. And—yes.

Q. So three out of your six salesmen during 1982 either quit or were laid off or were terminated; is that right?

A. That's correct.

Q. Three remained?

A. Three remained.

Q. In addition to your sales manager?

A. That's correct.

Q. Now, was Mr. McClendon's position eliminated after the time that he was laid off?

[57] A. No.

Q. Who took his position?

A. Dick Jeffries.

Q. Mr. Jeffries at that time was the sales manager of the Houston branch, isn't that right?

A. That's correct.

Q. And he was transferred then from the sales manager of the Houston branch to take over Mr. McClendon's position in the northern part of Texas; is that right?

A. That's correct.

Q. Did anyone replace Mr. Jeffries as sales manager?

A. No.

Q. What happened with that position?

A. In the total reduction and everything, everybody had to do a little more, including me.

Q. Well, what happened to that position?

A. I serve as that position, in both positions.

Q. So now not only are you the branch manager, but you are also the sales manager?

A. In essence, yes.

Q. Would it be fair to say that that position [58] was eliminated?

A. I don't feel that it was eliminated totally. But if you had to reduce, that's where, you know, you had to spread the work out. You had seven people reporting to me either directly or indirectly doing the work needed to be done. The work still had to be done, so you were going to do it with six. So you had to choose of those seven what six remain, and that's what it comes down to.

Q. So you made a determination that there were going to be six people that were going to continue to be employed by Ingersoll-Rand to perform their function in your branch; is that right?

A. The sales function in the branch, that's correct.

Q. But unfortunately you had seven employees?

A. That's correct.

Q. And so one of them had to go, at least as far as you were concerned?

A. That's correct.

Q. And that individual turned out to be Mr. McClendon?

A. That's correct.

* * * *

[60] Q. Okay. You had Mr. Dick Jeffries who was then the sales manager, and it's your best estimation that he had been working for eight or nine years at that point in time; is that right?

A. Yes.

Q. You had Mr. LaBlanc who had been working for Ingersoll-Rand how long?

A. About four years. And I'm not really sure of that, but that's about right.

Q. You had Mr. McClendon who had been working for Ingersoll-Rand for nine years and eight months?

A. That's correct.

Q. And you had Mr. Cagel who had been working for how long?

A. I'm going to say about eight years. And that's —it could have been seven, somewhere in there.

Q. Is it your testimony, sir, that you did not make any determination of the relative longevity of these various employees in determining who you would let go?

A. Absolutely none.

Q. They didn't play any part whatsoever?

[61] Q. What did you make the determination based on?

A. In sales, you judge in a certain area—you have to judge all the sales people and how they stack up against their territory, what they are doing, their potential for what they are doing at the time they are doing it. And if you have twenty people, you usually rate them one, two, three, four, five, six, seven, eight, nine. If you have five, six or seven, you rate them. And that's what I did.

Q. And what you are telling me, then, is that in that rating of one through seven Mr. McClendon was number seven?

A. That's correct.

Q. And what factors do you utilize in rating your people one through seven?

A. Okay. You look at obvious job performance, how they react when you are there with the customer. You look at that. That's a personal feeling. You look at how their reports are done. You look at potential with the company, where they are going, what's their next step. I mean, you are [62] looking at where we can go and how they can benefit Ingersoll-Rand Company for the long haul and short haul.

Now, a lot of things come into play in that. And you try to put all that together and make a judgment. Sometimes people come very close to each other. Sometimes one guy is ten times better than anybody else.

Q. Well, certainly profitability fits in there somewhere, doesn't it?

A. That's job performance, profitability, and how they do in the territory where they are. And that's what I mean by relationship, when you are with the company, how they interact with the customer.

Q. Are you aware of any other lawsuits, sir, relating to termination or laying off of any of these other employees?

A. No.

Q. Is this a copy of your signature, sir, that's reflected on page 4 of the Defendant's Exhibit No. 1?

A. Yes, sir.

* * * *

EXHIBIT "B"

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON,
Plaintiff,

vs.

INGERSOLL-RAND CO. d/b/a
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP,
Defendant.

AFFIDAVIT OF RICHARD S. OLMAN

STATE OF NEW JERSEY)
)
COUNTY OF MORRIS)

BEFORE ME, the undersigned authority, on this day personally appeared RICHARD S. OLMAN, General Manager for Distributor Sales, Construction and Equipment Group for the INGERSOLL-RAND COMPANY, Defendant in the referenced litigation, and did on oath depose and say as follows:

> My name is RICHARD S. OLMAN. I am General Manager for Distributor Sales, Construction and Equipment Group for the Ingersoll-Rand Company. I am [an] adult and am fully capable, competent and qualified to make this Affidavit as a duly authorized representative of the Ingersoll-Rand Company. This affidavit is based upon my personal knowledge.

The employment relationship of the Plaintiff in this lawsuit, Perry McClendon, with Ingersoll-Rand was at all times, including that time period during which he was laid off (November 19, 1982) an "at-will" employment arrangement whereby employment could be terminated by either the employer or the employee at any time and for any reason or for no reason. The "at-will" relationship was never altered in any respect either in writing or orally.

I am also familiar with the "Compensation Arrangement" customarily used with the sales personnel such as the Plaintiff. This arrangement was not a contract of employment, but rather merely undertook to establish a scheme of compensation for the employee.

Mr. McClendon was laid off after my instruction to his supervisor, Mr. Warren J. Carroll, to reduce his staff pursuant to a company wide manpower reduction. This program was instituted as a measure to help counter-act the adverse impact on the company of external economic factors.

I am familiar with the pleadings on file in this cause, and I have read the foregoing Motion for Summary Judgment and know the statements of facts contained therein, and the instruments attached thereto as Exhibits, to be true and correct of my own personal knowledge, and such statements are hereby incorporated in this Affidavit as if set out verbatim.

I have made this Affidavit in support of Defendant's Motion for Summary Judgment based upon personal knowledge and am competent to testify to all matters asserted herein.

/s/ Richard S. Olman
RICHARD S. OLMAN
General Manager of Distributor Sales;
Construction and Equipment Group

SWORN AND SUBSCRIBED to before me on this the 20 day of May, 1987, witness which my hand and official seal.

/s/ Laurie A. Munro Bashard
LAURIE A. MUNRO BASHARD
Notary Public in and for the
State of New Jersey

My Commission Expires January 23, 1991

EXHIBIT "C"

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON,
Plaintiff,
vs.
INGERSOLL-RAND CO. d/b/a
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP,
Defendant.

AFFIDAVIT OF WILLIAM T. LITTLE

STATE OF TEXAS)
)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared WILLIAM T. LITTLE, attorney of record for the Defendant in the above-entitled and numbered cause, INGERSOLL-RAND COMPANY, and did on oath depose and say as follows:

My name is WILLIAM T. LITTLE. I am the attorney of record for the Defendant in the above-referenced litigation, the Ingersoll-Rand Company. I am over the age of eighteen and am fully capable, competent and qualified to make this Affidavit.

On March 19, 1985, I drafted and signed a letter to Mr. W. Allyn Hoaglund, the then acting attorney

for the Plaintiff which informed him that the pension and retirement benefits obtaining to the Plaintiff by virtue of his tenure with the Ingersoll-Rand Company had vested at the time he was laid off in November of 1982.

The instrument attached to this Affidavit as Exhibit "C-1" is what it purports to be, that being a true and correct copy of the above-referenced letter, along with the signed certified mail receipts signifying its receipt by the addressee.

I have made this authenticating Affidavit pursuant to Rule 901 of the Texas Rules of Evidence based upon my personal knowledge as to all of the matters contained herein, and am competent to testify thereto.

Further Affiant sayeth not.

/s/ William T. Little
WILLIAM T. LITTLE
Attorney of Record

SWORN AND SUBSCRIBED to before me on this the 10th day of June, 1987, witness which my hand and official seal.

/s/ Carolyn Castowe
Notary Public in and for the
State of Texas

My Commission Expires: 11-17-88

EXHIBIT "C-1"

March 19, 1985

CERTIFIED MAIL

Mr. W. Allyn Hoaglund
Helm, Pletcher & Hogan
Two Houston Center, Suite 2800
Houston, Texas 77010

RE: No. 84-44080; Perry McClendon v. Ingersoll-Rand Company; In the 133rd Judicial District Court of Harris County, Texas

SUBJECT: Eligibility for Deferred Vested Pension Plan

Dear Mr. Hoaglund:

This letter is to confirm that Ingersoll-Rand Company has determined that Mr. Perry McClendon, your client, is eligible under the terms of the Ingersoll-Rand Company Pension Plan One for a deferred vested pension payable at his normal retirement date. The amount of this deferred vested benefit expressed as a single life annuity is $373.61 per month.

I have enclosed a letter of confirmation from Mr. H. E. Doerr, the Manager of the Ingersoll-Rand Pension Plan. I have also enclosed an Ingersoll-Rand booklet entitled "Summary Plan Description" concerning this pension plan. We would appreciate it if you would forward these materials to your client at your earliest convenience.

If you have any questions about these developments, please do not hesitate to contact me.

Sincerely,

/s/ William T. Little

WTL:bd
Enclosures
RJD1/5

bcc: Mr. Anthony J. Fischer
Ingersoll-Rand Company
200 Chestnut Ridge Road
Woodcliff Lake, NJ 07675
(with enclosure)

Mr. H. E. Doerr
Manager, I-R Pension Plan
Ingersoll-Rand Company
200 Chestnut Ridge Road
Woodcliff Lake, NJ 07675
(with enclosure)

Mr. Jeffrey R. Parsons

PS Form 3811, July 1983 447-845 DOMESTIC RETURN RECEIPT

SENDER: Complete items 1, 2, 3 and 4.
Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for service(s) requested.

1. ☐ Show to whom, date and address of delivery.
2. ☐ Restricted Delivery.

3. Article Addressed to: Allyn Naglund 2110 Houston Dr, Ste 200 Houston TX 77010

4. Type of Service: ☐ Registered ☐ Insured ☐ Certified ☐ COD ☐ Express Mail — Article Number: P560 469 095

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature — Addressee
X

6. Signature — Agent
X

7. Date of Delivery 3/22/85

8. Addressee's Address (ONLY if requested and fee paid)

PS Form 3800, Feb. 1982 * U.S.G.P.O. 1983-403-517

RECEIPT FOR CERTIFIED MAIL
NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

Sent to Allyn Naglund
Street and No.
P.O., State and ZIP Code
Postage $
Certified Fee
Special Delivery Fee
Restricted Delivery Fee
Return Receipt Showing to whom and Date Delivered
Return receipt showing to whom, Date, and Address of Delivery
TOTAL Postage and Fees $
Postmark or Date
DR/mc Closing 3/19/85

EXHIBIT "A"

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

v.

INGERSOLL-RAND CO. dba
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

PLAINTIFF'S SECOND AMENDED ORIGINAL PETITION

[Filed July 27, 1987]

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now PERRY McCLENDON, hereinafter called Plaintiff, still complaining of INGERSOLL-RAND CO. dba INGERSOLL-RAND CO. CONSTRUCTION EQUIPMENT GROUP, hereinafter called Defendant, and for cause of action and by way of amended Petition would respectfully show unto the Court and Jury as follows:

I.

Plaintiff is a resident of DeSoto, Dallas County, Texas.

Defendant has been served with citation herein and has filed its Answer. Any further service will be effected on its attorney of record.

II.

This cause of action arises out of a premature and wrongful termination of Plaintiff's employment by Defendant on or about November 19, 1982. This termination violated and breached a contract with, agreements with and promises to Plaintiff, who had worked for Defendant for some nine (9) years and eight (8) months.

III.

Defendant terminated Plaintiff one (1) day after he was notified of same, without good and reasonable cause and/or in bad faith. Said termination was without good cause and in bad faith for the reason that Plaintiff had nine (9) years and eight (8) months of service with Defendant, which was four (4) months prior to the date his retirement and pension benefits with Defendant would have vested. Furthermore, Plaintiff would show that his job position was not eliminated but filled, with another employee. Defendant's actions and wrongs as heretofore described have resulted in damage and injury to Plaintiff as hereinafter stated. Alternatively, Plaintiff would show that Defendant defrauded him of his pension and retirement benefits by terminating him four (4) months prior to his completion of ten (10) years of service. Plaintiff's termination was a willful and intentional act by Defendant.

IV.

In addition to the Defendant's breach of employment contract and Defendant's wrongful termination of Plaintiff, Plaintiff would further, or in the alternative, show that Defendant breached its duty and implied covenant of good faith and/or fair dealing in connection with Defendant's treatment and termination of Plaintiff. Defendant acted in bad faith and unfairly in dealing with Plaintiff. In this connection, Plaintiff would show that there was an unequal bargaining power between Plaintiff

and Defendant, in that Defendant had a superior power and advantage over Plaintiff, which Defendant abused; Defendant drafted the agreement and contract in question; and Defendant acted unscrupulously as the stronger party to take advantage of the Plaintiff as a weaker party who was without adequate bargaining power. Accordingly, the relationship between Defendant and Plaintiff was a special relationship, or alternatively, the type of relationship which gives rise to the implied duty and covenant of good faith and fair dealing, which Defendant breached. The above and foregoing breach was a proximate or producing cause of injury and damages to Plaintiff, both in the form of lost earnings and earning capacity, mental anguish, sleeplessness, nervousness and emotional distress. Because of the nature of this breach, Plaintiff should be entitled to both actual and exemplary damages.

V.

In addition to the above and foregoing, or in the alternative, Plaintiff would show that Defendant tortiously and intentionally inflicted emotional distress and mental anguish on Plaintiff in connection with the treatment of Plaintiff, the termination of Plaintiff and/or the handling of Plaintiff's employee benefits, profit sharing and retirement program. In this connection, Plaintiff would show that Defendant terminated Plaintiff just short of the time when, according to Defendant, Plaintiff's retirement and/or profit sharing program would have been vested. Although Defendant has later admitted that Plaintiff's retirement and profit sharing program with Defendant had already vested by the time of his termination, this admission came only after litigation had been initiated, and many months of sleeplessness, nervousness, mental anguish and emotional distress had been suffered by Plaintiff. Accordingly, Plaintiff seeks recovery because of Defendant's conduct in this regard, which proximately caused or produced injury and damages to Plaintiff.

VI.

As a consequence and result of Defendant's wrongful actions and breaches, Plaintiff has sustained a loss of income and commission, personal expense and inconvenience, loss of employee benefits and profit sharing and retirement programs, sleeplessness, nervousness and mental anguish and emotional distress. Plaintiff, therefore, seeks recovery in the amount of SEVEN HUNDRED FIFTY-THOUSAND DOLLARS ($750,000.00).

VII.

Because of the above and foregoing, Defendant should compensate Plaintiff for the above losses, injuries and damages. Furthermore, as a result of the unconscionable and willful actions of Defendant in terminating Plaintiff prior to the time that his retirement benefits had vested and awarding the sales territory he had developed to another individual without just cause, Plaintiff is entitled to recover exemplary damages in the amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00). Pursuant to Section 38.001 of the Texas Remedies Code, it has been necessary for Plaintiff to employ the undersigned counsel to represent him in this case, for which he is entitled to reasonable attorney's fees, together with pre-judgment interest on the liquidated amount of damages sustained by Plaintiff.

VIII.

At the time of his termination, Plaintiff was 45 years of age, with a life expectancy of 29.1 years according to the United States Life Tables, 1978, Volume II, Section 5, a certified copy of which will be used by Plaintiff as evidence in the trial of this case, and Defendant is hereby notified of said intent.

IX.

By reason of all of the above and foregoing, and on account of the injuries suffered by your Plaintiff on the

occasion made the basis of this suit, your Plaintiff is entitled to recover actual damages in the amount of SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000.00) and exemplary damages in the amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00).

WHEREFORE, PREMISES CONSIDERED, your Plaintiff prays that the Defendant be cited in terms of law to appear and answer herein, and that upon final trial of this case, he have judgment against the Defendant for actual damages in the amount of SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000.00) and exemplary damages in the amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00); that he have interest on the judgment at the legal rate; that he recover costs of Court in this behalf expended, and that he have such other and further relief, both general and special, legal and equitable, to which he may show himself justly entitled, and in duty bound will ever pray.

Respectfully submitted,

HELM, PLETCHER, HOGAN,
BOWEN & SAUNDERS
2929 Allen Parkway, Suite 2700
Houston, Texas 77019-2120
(713) 522-4550

MICHAEL Y. SAUNDERS
State Bar No. 17684000
JOHN W. TAVORMINA
State Bar No. 19681550
Attorneys for Plaintiff

[Certificate of Service Omitted in Printing]

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

v.

INGERSOLL-RAND CO. dba
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

ORDER

BE IT REMEMBERED that came on for submission Plaintiff's Motion for Leave to File Second Amended Original Petition, and the Court, after reviewing the pleadings on file, is of the opinion that said Motion is meritorious and should be granted, and it is, therefore

ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for Leave to File Second Amended Original Petition shall be filed among the papers in this cause as an effective pleading; that a period of three (3) days shall lapse between the filing of Plaintiff's Motion for Leave and a ruling on Defendant's Motion for Summary Judgment; and the Court has considered Plaintiff's Second Amended Original Petition and the matters contained therein prior to any ruling on Defendant's Motion for Summary Judgment.

SIGNED this the ——— day of ———, 1987.

Judge Presiding

APPROVED AS TO FORM AND SUBSTANCE
AND ENTRY REQUESTED:

HELM, PLETCHER, HOGAN, BOWEN & SAUNDERS
2929 Allen Parkway, Suite 2700
Houston, Texas, 77019-2120
(713) 522-4550

MICHAEL Y. SAUNDERS
State Bar Number 17684000
JOHN W. TAVORMINA
State Bar Number 19681550

Attorneys for Plaintiff

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

v.

INGERSOLL-RAND CO. dba
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

MOTION FOR LEAVE TO FILE AMENDED PETITION

[Filed July 27, 1987]

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now PERRY McCLENDON, hereinafter called Plaintiff, and files this his Motion for Leave to File Plaintiff's Second Amended Original Petition prior to the time the Court has finally considered and ruled on Defendant's Motion for Summary Judgment on file herein, and in support of such Motion would respectfully show as follows:

I.

Although Plaintiff raised issues concerning Defendant's breach of duty and/or covenant of good faith and fair dealing, and also raised Defendant's intentional infliction of emotional distress and/or mental anguish in Plaintiff's Response to Defendant's Motion for Summary Judgment, and although such Response filed by Plaintiff was timely filed, Plaintiff has discovered that Plaintiff's First Amended Original Petition does not state specifically and in detail these legal theories. Plaintiff's First Amended Original Petition does set forth those legal theories very broadly and in a way which should certainly have given

fair notice to Defendant that Plaintiff was relying on those legal theories as grounds of recovery. However, as a precaution, Plaintiff would urge the Court to allow Plaintiff to file Plaintiff's Second Amended Original Petition, which specifically sets out these two legal grounds and theories of recovery explicitly and directly as separate paragraphs. Plaintiff's Second Amended Original Petition, which Plaintiff seeks leave to file, is attached hereto as Exhibit "A" and incorporated herein by reference for all purposes as if set forth verbatim.

II.

Plaintiff realizes that the Motion for Leave to File Plaintiff's Second Amended Original Petition is being filed on the same day as the hearing was set for Defendant's Motion for Summary Judgment. It is for this reason for Plaintiff seeks leave of Court to file this amended petition. Plaintiff would show that this amended petition, and the two grounds of recovery which are added thereto explicitly and specifically (as opposed to generally and broadly) will come as no surprise to Defendant because of the language of Plaintiff's First Amended Original Petition, in addition to Plaintiff's Response to Defendant's Motion for Summary Judgment. Moreover, the evidence which has been taken in the form of depositions in this case clearly indicates Plaintiff's intention to rely on such grounds of recovery, at least in part. Moreover, Plaintiff would show that the granting of this Motion for Leave to File Plaintiff's Second Amended Original Petition will not delay the disposition of this case unreasonably or unduly, and Plaintiff is most willing to agree to a continuance or rehearing of Defendant's Motion for Summary Judgment if Defendant feels further pleadings, briefs or presentation of summary judgment evidence is required to meet the specific grounds of recovery, to the extent Defendant has not already done so. Since Defendant has already addressed both of these grounds of recovery in its Motion and Responses, this should not present a problem.

III.

Plaintiff would respectfully urge that this Court delay finally considering and ruling on Defendant's Motion for Summary Judgment until this Motion for Leave to File Plaintiff's Second Amended Original Petition is considered and ruled upon by submission, three (3) days after the date of its filing.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully prays that his Motion for Leave to File Plaintiff's Second Amended Original Petition be granted, and that such Petition be ordered filed among the papers in this cause as an effective pleading, and that such Motion be granted and the Order granting same be signed prior to the Court's finally considering and ruling on Defendant's Motion for Summary Judgment, and that the Court allow three (3) days to pass from the time of filing of this Motion for Leave and any ruling on Defendant's Motion for Summary Judgment. Good cause exists for the granting of this Motion, and Plaintiff prays that the Court so find. Plaintiff prays for such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

HELM, PLETCHER, HOGAN,
BOWEN & SAUNDERS
2929 Allen Parkway, Suite 2700
Houston, Texas 77019-2120
(713) 522-4550

/s/ Michael Y. Saunders
MICHAEL Y. SAUNDERS
State Bar No. 17684000
JOHN W. TAVORMINA
State Bar No. 19681550
Attorneys for Plaintiff

[Certificate of Service Omitted in Printing]

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

v.

INGERSOLL-RAND CO. dba
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

ORDER

[Filed July 31, 1987]

BE IT REMEMBERED that came on for submission Plaintiff's Motion for Leave to File Second Amended Original Petition, and the Court, after reviewing the pleadings on file, is of the opinion that said Motion is meritorious and should be granted, and it is, therefore

ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for Leave to File Second Amended Original Petition is hereby granted; that Plaintiff's Second Amended Original Petition shall be filed among the papers in this cause as an effective pleading; that a period of three (3) days shall lapse between the filing of Plaintiff's Motion for Leave and a ruling on Defendant's Motion for Summary Judgment; and the Court has considered Plaintiff's Second Amended Original Petition and the matters contained therein prior to any ruling on Defendant's Motion for Summary Judgment.

SIGNED this the 31 day of July, 1987.

/s/ Lamar McCorkle
Judge Presiding

APPROVED AS TO FORM AND SUBSTANCE
AND ENTRY REQUESTED:

HELM, PLETCHER, HOGAN, BOWEN & SAUNDERS
2929 Allen Parkway, Suite 2700
Houston, Texas 77019-2120
(713) 522-4550

/s/ Michael Y. Saunders
MICHAEL Y. SAUNDERS
State Bar Number 17684000
JOHN W. TAVORMINA
State Bar Number 19681550

Attorneys for Plaintiff

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

April 16, 1990

Mr. Glen D. Nager
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, DC 20005-2088

Re: Ingersoll-Rand Company
v. Perry McClendon
No. 89-1298

Dear Mr. Nager:

The Court today entered the following order in the above entitled case:

The motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae is granted. The motion of American Paper Institute, Inc. for leave to file a brief as amicus curiae is granted. The motion of Equal Employment Advisory Council for leave to file a brief as amicus curiae is granted. The petition for a writ of certiorari is granted.

Very truly yours,

/s/ Joseph F. Spaniol, Jr.
JOSEPH F. SPANIOL, JR.
Clerk

IN THE SUPREME COURT OF TEXAS

FROM HARRIS COUNTY
FOURTEENTH DISTRICT

No. C-7973

PERRY MCCLENDON,
Petitioner

vs.

INGERSOLL-RAND COMPANY, d/b/a
INGERSOLL-RAND COMPANY,
Respondent

STAY ORDER

May 2, 1990

WHEREAS, respondent's amended motion for recall of mandate and for stay order filed herein on April 27, 1990 in the above styled and numbered cause has been granted in part by this Court, only as to the request for stay order, and

WHEREAS, on April 16, 1990, the United States Supreme Court granted Writ of Certiorari in this cause, therefore, pursuant to Rule 186(b), Texas Rules of Appellate Procedure,

IT IS ORDERED, that The Honorable Ray Hardy, District Clerk in and for Harris County, Texas, stay the enforcement of the mandate issued by this Court on December 11, 1989 in Cause Number C-7973, *Perry McClendon vs. Ingersoll-Rand Company, d/b/a Ingersoll-Rand Company Construction Equipment Group*, No. 84-44080 in the 133rd District Court, Harris County, Texas, until further order of this Court.

WITNESS, The Honorable Thomas R. Phillips, Chief Justice of our said Supreme Court, with the Seal thereof annexed at The City of Austin, on this the 2nd day of May, 1990.

JOHN T. ADAMS
Clerk

By /s/ Peggy Littlefield
PEGGY LITTLEFIELD
Chief Deputy Clerk

Supreme Court, U.S.
FILED
JUN 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1298

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY MCCLENDON,
Respondent.

On Writ of Certiorari to the Supreme Court of Texas

BRIEF FOR THE PETITIONER

GLEN D. NAGER
(Counsel of Record)
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939

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Counsel for Petitioner

Of Counsel:
WILLIAM T. LITTLE
GILPIN, PAXSON & BERSCH
2300 First Interstate Tower
1300 Post Oak Boulevard
Houston, Texas 77056-3010
(713) 623-8800

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 ("ERISA") preempts a state common law claim that an employer has unlawfully discharged an employee in order to interfere with his attainment of benefits under an ERISA-covered pension benefit plan.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the court below were: Perry McClendon and the Ingersoll-Rand Company.*

---

* Ingersoll-Rand Company has an interest in the following corporate entities and partnerships: Dresser-Rand Company; Dresser-Rand Machinery; Dresser-Rand Italia; Dresser-Rand S.A.; Dresser-Rand Canada, Inc.; Dresser-Rand Compression Services S.A.; Dresser-Rand Service Personnel B.V.; Dresser-Rand Japan Ltd.; Dresser-Rand B.V.; Turbodyne S.A. de C.V.; Dresser-Rand Singapore Pte. Ltd.; Dresser-Rand de Venezula S.A.; Dresser-Rand GmbH; Kongsberg Dresser Power, Inc.; Kongsberg Dresser Power Pte. Ltd.; KDP Commercio E. Industrial Ltd.; Kongsberg Dresser Power A/S; Dresser-Rand Holding Company; Dresser-Rand Overseas Sales Company; Dresser-Rand Sales Company, S.A.; Southwest Industries, Inc.; Turbodyne Electric Power Co.; Tepco/Pembroke Power, Inc.; Dresser-Rand U.K. Ltd.; Dresser-Rand Service S.a.r.e.; Norton/Torrington Ceramic Bearings Company; Nastach, Inc.; Ingersoll-Rand (India) Limited; and Niject Services Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1298

INGERSOLL-RAND COMPANY,
Petitioner,
v.
PERRY MCCLENDON,
Respondent.

On Writ of Certiorari to the Supreme Court of Texas

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Texas (Pet. App. 1a-16a) is reported at 779 S.W.2d 69. The opinion of the Court of Appeals of Texas (Pet. App. 17a-24a) is reported at 757 S.W.2d 816. The opinion of the district court granting summary judgment for petitioner (Pet. App. 25a-26a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on October 18, 1989. A timely motion for rehearing was denied on November 15, 1989. Pet. App. 27a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Section 502 of ERISA, 29 U.S.C. § 1132, provides in pertinent part:

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or a beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

* * * *

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought

by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

* * * *

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

Section 510 of ERISA, 29 U.S.C. § 1140, provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled

under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Section 514 of ERISA, 29 U.S.C. § 1144, provides in pertinent part:

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * * *

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Section 411(d)(1) of the Internal Revenue Code, 26 U.S.C. § 411(d)(1), provides in pertinent part:

(d) Special rules.—

(1) Coordination with section 401(a)(4).—A plan which satisfies the requirements of this section shall be treated as satisfying any vesting requirements resulting from the application of section 401(a)(4) unless—

(A) there has been a pattern of abuse under the plan (such as a dismissal of employees before their accrued benefits become nonforfeitable) tending to discriminate in favor of employees who are highly compensated employees (within the meaning of section 414(q)), or

(B) there have been, or there is reason to believe there will be, an accrual of benefits or forfeitures tending to discriminate in favor of employees who are highly compensated employees (within the meaning of section 414(q)).

STATEMENT

1. In 1974, after almost a decade of study, Congress enacted the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 ("ERISA"). Congress found that "the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; [and] that they are affected with a national public interest." 29 U.S.C. § 1001(a).

Congress further found that "despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered;

[and] that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits." *Id.* Congress therefore declared that the policy of ERISA is "to protect . . . the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service," and to protect the interests of participants in all types of employee benefit plans "by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(c), (b).

Specifically, in Title I of ERISA, Congress established certain minimum standards applicable to an employer's design and maintenance of its employee benefit plans.[1] Among other things, it imposed new requirements for reporting and disclosure relating to such plans. 29 U.S.C. §§ 1021-1031. It limited the age and service conditions that an employer may impose for "participation" in a pension plan. 29 U.S.C. § 1052. It required that an employee's normal retirement benefit "accrue"—*i.e.*, be earned—more or less ratably during the period of the employee's participation in the plan, and that the employee's right to his accrued benefit "vest"—*i.e.*, become nonforfeitable—after a minimum service period. 29 U.S.C. §§ 1053, 1054. With certain exceptions, it further required that an employer establish a trust and make periodic contributions sufficient to fund promised benefits

[1] ERISA is organized in four titles. Title I of ERISA—the so-called "labor provisions"—establishes the federal law occuying the field of employee benefits. Title II of ERISA—the so-called "Code provisions"—makes amendments to the Internal Revenue Code, parallel to those Title I provisions that affect "qualified plans" under Section 401(a) of the Code. Title III of ERISA concerns coordination of administration among the various federal agencies. And Title IV of ERISA establishes the plan termination insurance program, administered by the Pension Benefit Guaranty Corporation.

on a sound actuarial basis. 29 U.S.C. §§ 1082-1085. It also established certain standards of conduct for fiduciaries of employee benefit plans. 29 U.S.C. §§ 1101-1114. And, finally, it established comprehensive rules for the administration and enforcement of employee rights in benefit plans that the statute's minimum standards are designed to protect and regulate. 29 U.S.C. §§ 1131-1145.

Among the enforcement rules so created are certain provisions aimed at protecting participants from wrongful interference with attainment of rights under the employee benefit plans. Section 510 of ERISA makes it "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ." 29 U.S.C. § 1140. In addition, Section 1012(a) of Title II of ERISA added Section 411(d)(1) to the Internal Revenue Code, which states that a plan may be required to provide an accelerated vesting schedule if "there has been a pattern of abuse under the plan (such as dismissal of employees before their accrued benefits become nonforfeitable) tending to discriminate in favor of employees who are highly compensated . . . ." 26 U.S.C. § 411(d)(1)(A).

ERISA makes the civil enforcement "provisions of [Section 502 of ERISA] applicable in the enforcement of [Section 510]." 29 U.S.C. § 1140. Section 502 of ERISA authorizes a plan participant, beneficiary, or fiduciary to bring suit "(A) to enjoin any act or practice which violates any provision of [Title I of ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief . . . ." 29 U.S.C. § 1132(a)(3). It also confers exclusive jurisdiction over such suits on the federal courts. 29 U.S.C. § 1132(e)(1). Finally, it requires that a certified copy of the complaint in any such action be served upon both the Secretary of Labor and the Secretary of Treasury, either of whom may intervene as a matter of right in the action. 29 U.S.C. § 1132(h).

ERISA caps these substantive and enforcement provisions by providing, in Section 514, that, except where expressly noted otherwise,[2] "the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any [covered] employee benefit plan. . . ." 29 U.S.C. § 1144(a). Section 514 defines the term "State law" to "include[] all laws, decisions, rules, regulations, or other State action having the effect of law, of any State," 29 U.S.C. § 1144(c)(1), and the term "State" to "include[] a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans" covered by the statute, 29 U.S.C. § 1144(c)(2).

2. Petitioner, Ingersoll-Rand Company, hired respondent, Perry McClendon, in August 1972 as a salesperson and distributor of construction equipment. Pet. App. 1a-2a; J.A. 24-26. At the time, petitioner provided respondent with a "Compensation Agreement" that detailed the commissions that respondent would earn on any sales made during the course of the next year. Pet. App. 2a, 18a, 19a; J.A. 28. Petitioner thereafter updated the "Compensation Agreement" on an approximately annual basis. Pet. App. 18a. Petitioner also allowed respondent to participate in its employee benefit plans, including its ERISA-covered pension plan. Pet. App. 2a, 18a; J.A. 28, 38-39.

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[2] ERISA expressly excepts from preemption: (1) any cause-of-action which arose, or any act or omission which occurred, before January 1, 1975, *see* 29 U.S.C. § 1144(b)(1); (2) state laws regulating insurance, banking, or securities, *see* 29 U.S.C. § 1144(b)(2); (3) any generally applicable criminal law of a state, *see* 29 U.S.C. § 1144(b)(4); (4) the Hawaii Prepaid Health Care Act, *see* 29 U.S.C. § 1144(b)(5); (5) qualified domestic relations orders, *see* 29 U.S.C. § 1144(b)(7); or (6) certain state laws regarding health plans that are necessary for the state to be eligible to receive reimbursements under Title XIX of the Social Security Act, *see* 29 U.S.C. § 1144(b)(8).

With the exception of an eight-month period in 1977 (J.A. 25-26), respondent was continuously employed by petitioner for approximately the next ten years. Pet. App. 2a. When the market for construction equipment declined in the fall of 1982, however, petitioner terminated the employment of respondent as part of a company-wide reduction-in-force. Pet. App. 2a, 24a; J.A. 21, 29, 34-35. At the time of his termination, respondent had accumulated nine years and eight months of actual service with petitioner. Pet. App. 2a, 18a; J.A. 25. Without investigating the matter or discussing his pension rights with any representative of petitioner (J.A. 39-41), respondent apparently concluded that he was four months shy of vesting under petitioner's pension plan. Pet. App. 2a, 18a; J.A. 41-43.

3. Respondent thereafter initiated suit against petitioner in state court for wrongful discharge. Pet. App. 2a & n.2; J.A. 5-7, 14-17, 65-71. Respondent principally claimed that petitioner had breached both a contract of employment with him and a duty of good faith and fair dealing in connection with the employment relationship. Pet. App. 2a & n.2; J.A. 6, 14-15, 66-67. Respondent alternatively claimed that petitioner had wrongfully terminated him in order to prevent his vesting under its pension plan. Pet. App. 2a & n.2; J.A. 14, 66-68. As remedies for these allegedly unlawful acts, respondent asked to be awarded, among other things, lost commissions, lost pension and other benefits, damages for emotional distress, and punitive damages. J.A. 6-7, 15-16, 67-68.

After a period of discovery, petitioner moved for summary judgment. In support of its motion, petitioner was able to show that the construction industry had suffered a "devastating" recession in 1982; that, as a consequence, petitioner had implemented a company-wide reduction-in-force; that respondent was terminated as part of this company-wide reduction-in-force; and that respondent was an at-will employee at the time of his termination.

J.A. 21-22, 29, 31-35, 37, 53-54, 58. In addition, petitioner was able to show both that respondent's claim of interference with pension benefits was based entirely on his subjective impression that petitioner had saved expenses by terminating him prior to his perceived vesting date, and that, contrary to his perception, respondent was, prior to his termination, in fact fully vested under the terms of the pension plan (because, under the plan's "break-in-service" rules,[3] respondent had received imputed vesting credit for the eight-month period in 1977 when he was not actually employed by petitioner). J.A. 41-43, 43-45, 60-61. The trial court rendered summary judgment in favor of petitioner. Pet. App. 25a-26a.

4. The court of appeals affirmed. Pet. App. 17a-24a. It initially held (*id.* at 20a-22a) that, contrary to respondent's claim, the "Compensation Agreement" in no way limited the circumstances in which petitioner could dissolve its employment relationship with respondent. The court further held (*id.* at 22a-24a) that, under Texas law, no covenant of good faith and fair dealing is implied into the employment relationship. Finally, it rejected respondent's claim that he had been discharged for an illicit reason, finding (*id.* at 24a) that the undisputed evidence showed that respondent had "incorrectly

[3] Attachments not included in the record below to a letter sent by petitioner to respondent prior to the filing of the summary judgment motion explain the break-in-service rules of the plan and their effect on respondent. *See* J.A. 62. These break-in-service rules were designed to comply with a regulation of the Treasury Department, which provides, in pertinent part, that:

> In determining a participant's period of service for vesting purposes, a plan shall take into account the following periods of severance—
>
> (A) If an employee severs from service by reason of a quit . . . and the employee then performs an hour of service within the meaning of 29 C.F.R. 2530.200b-2(a)(1) within 12 months of the severance from service date, the plan is required to take into account the period of severance.

26 C.F.R. § 1.410(a)-7(d)(1)(iii).

concluded that being discharged before ten years of service would prevent him from collecting certain benefits," and that petitioner "did nothing more than react to an economic downturn by reducing its sales force."

5. In a 5-4 decision, the Supreme Court of Texas reversed and remanded. Pet. App. 1a-16a. It declined to address respondent's claim that a duty of good faith and fair dealing should be implied into the employment relationship between petitioner and respondent. *Id.* at 2a, n.1. Instead, it held that a cause-of-action lies under Texas common law against an employer whose "principal reason" for terminating an employee is to avoid contributing to or paying benefits under the employee's pension fund. *Id.* at 1a, 5a. In reaching this conclusion, the court expressly held that Section 514 of ERISA does not preempt such a state common-law cause of action. *Id.* at 5a n.3.

a. The majority of the Supreme Court of Texas began its opinion by noting (Pet. App. 3a) that, while "Texas courts have traditionally followed the employment at-will doctrine," they have placed "numerous exceptions . . . on its application." The majority explained (*id.* at 4a) that many states, including Texas, "have accepted the principle that public policy can limit an employer's power to discharge at-will employees." Specifically, it pointed out (*id.* at 4a-5a) that the United States District Court for the Eastern District of New York, construing New York law, "has recognized a cause of action for wrongful discharge when an employee alleges that he was terminated to deprive him of pension benefits."

The majority next found (Pet. App. 5a) that the State of Texas "has an interest in protecting employees' interests in pension plans." In support of this conclusion, the court cited (*id.* at 5a) both a Texas statute (Tex. Rev. Civ. Stat. Title 110B), which provides pensions for public employees of the State of Texas, and Section 510 of ERISA. Indeed, the majority stated (Pet. App. 5a) that

"[t]he very passage of ERISA demonstrates the great significance attached to income security for retirement purposes."

The majority then concluded (Pet. App. 5a) that "public policy favors the protection of integrity in pension plans and requires in this case an exception to the employment at-will doctrine." Specifically, it held that (*id.* at 5a) an employee should be "allow[ed] recovery when [he] proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund." In so concluding, the majority conceded (*id.* at 5a n.3) that there are cases holding "that a claim for wrongful discharge in order to avoid the payment of pension funds is preempted by ERISA." But the majority determined (*id.* (emphasis in original)) that these cases are distinguishable because respondent "is *not* seeking lost *pension benefits* but is instead seeking lost future wages, mental anguish and punitive damages as a result of the wrongful discharge."

b. Justice Cook, joined by Chief Justice Phillips and Justice Hecht, filed a dissenting opinion. Pet. App. 6a-13a. Justice Cook agreed with the majority (*id.* at 6a) that "ERISA demonstrates the great significance attached to income security for retirement." But he found it even more significant (*id.*) that ERISA "confers upon employees a federal version of the cause of action created by this court, confines litigation of the federal cause of action to the federal courts, and preempts the state cause of action." Significantly he found (*id.* at 7a) that, under Section 514 of ERISA, "all provisions of the subchapter in which § 510 is contained preempt state laws that 'relate to' employee benefit plans," and that "[t]here can be no doubt that the law created today by [the majority] relates to a pension plan and directly conflicts with the specific provision of § 510 establishing a federal cause of action under ERISA." Indeed, he found (*id.* at 7a-8a) that, "because preemption of the claim at issue

leaves plaintiff with a cause of action that can be litigated only in federal court, ERISA preempts the [state] forum as well as [the] cause of action."

Justice Cook strongly objected (Pet. App. 8a-9a) that the majority opinion "misleads employees by providing them with an imaginary claim." While he believed (*id.* at 9a) that "ERISA's provisions make it doubtful that a state court even has power to adjudicate the new cause of action," he was certain (*id.*) that "astute defendants need not wait to find out. They need only remove to federal court and raise a defense of preemption." Justice Cook expressed (*id.*) "regret [for] the confusion and prolonged litigation we have thrust upon employers and employees in their efforts to resolve disputes concerning their pension plans."

Justice Cook also objected (Pet. App. 9a-11a) that the majority opinion "undercuts the very purpose of summary judgment proceedings, which are designed to eliminate patently unmeritorious claims and untenable defenses." He noted (*id.* at 10a) that, under ERISA, "an employee must establish more than the mere fact that the termination of his employment resulted in a monetary savings to his employer." Yet he observed (*id.*) that, under the majority's opinion, "an employee is presumably guaranteed a jury trial by merely alleging that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund." Justice Cook concluded (*id.* at 10a-11a) that the majority's approach to the summary judgment issue would both "unduly chill[] an employer's right to terminate an at-will employee with or without cause" and open the "proverbial 'floodgates of litigation . . . .'"

c. Justice Gonzalez also filed a dissenting opinion. Pet. App. 13a-16a. He agreed with Justice Cook's conclusion (*id.* at 13a-14a) that "this cause of action is preempted by ERISA" and that "it will be very difficult, if not im-

possible, to filter out meritless cases by summary judgment as a result of today's opinion." He further found (*id.* at 14a-16a) that "the federal authority that the court finds persuasive is questionable," and noted that other courts had refused to follow it.

SUMMARY OF ARGUMENT

In ERISA, Congress wanted to ensure that the benefit promises that employers make are kept. It thus devised a comprehensive and reticulated regulatory scheme which, among other things, protects employees against purposeful interference by their employer with attainment of their rights under an employee benefit plan. The Supreme Court of Texas, by its decision below, has attempted to create an alternative set of rights and remedies available to an employee in such a situation. The language, legislative history, and purpose of ERISA's preemption provision, however, make it clear that the Supreme Court of Texas may not lawfully do so.

A. By the plain terms of Section 514(a) of ERISA, the statute preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a). As this Court has repeatedly recognized, this expansive language occupies for Federal authority the sole power to regulate the field of employee benefit plans. *See, e.g., Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). Specifically, Section 514(a) displaces any state law that has "a connection with or reference to" an ERISA-covered plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).

The state common law claim recognized by the court below plainly "relates to" an ERISA-covered plan in this sense. Absent "reference to" petitioner's ERISA-covered pension plan, respondent simply would have no cause-of-action at all under Texas law. Moreover, the purpose and

effect of the Texas law are to insulate from wrongful interference the employee's right to benefits promised under the pension plan—the very heart of the plan itself. Indeed, the law seeks to protect vesting rights—substantive rights that ERISA itself requires the plan to afford to employees. As an enforcement mechanism for benefit rights brought into being by ERISA and provided by an ERISA-covered plan, the Texas law clearly "relates to" that plan and must be preempted.

B. The structure of ERISA confirms that the cause-of-action recognized by the court below "relates to" an ERISA-covered plan, because ERISA itself contains provisions to secure the rights of employees against improper threats of employer-interference with attainment of promised benefits. These provisions evidence the understanding of Congress that such laws "relate to" the plans covered by the statute.

Specifically, Section 510 of ERISA bars employers from terminating or discriminating against employees for the purpose of interfering with their attainment of rights under a plan. *See* 29 U.S.C. § 1140. It prevents employers from circumventing, and thus gives meaning to, the vesting and other minimum standards established by ERISA and contained in pension plans. It is thus part of the interrelated scheme of minimum standards that Congress devised to ensure that benefit promises are kept. The Congress enacting Section 510 must have understood it to "relate to" the plans that ERISA was seeking to protect and regulate.

Two other provisions of ERISA confirm this congressional understanding. First, as a parallel to Section 510, ERISA enacted Section 411(d)(1) of the Internal Revenue Code, under which a plan may be required to provide an accelerated vesting schedule if there has been a pattern of abuse—such as dismissal of employees before they became vested under a plan; such a direct regulation of the terms of a plan by a parallel ERISA provision

demonstrates that Congress understood Section 510, and thus any comparable state law, indirectly to have this relation as well. Second, Section 502 of ERISA is expressly designated as the enforcement mechanism for Section 510 claims and, as this Court has made clear, Section 514 of ERISA is properly read to encompass, and thus to preempt, all state law causes-of-action for claims within the scope of Section 502. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. at 52-54, 57. The cause-of-action recognized by the court below states such a claim.

C. The legislative history of the statute confirms that, in enacting Section 514, Congress understood that ERISA would preempt, among other things, any state law that, like Section 510 of ERISA, seeks indirectly to protect rights under employee benefit plans by prohibiting employment decisions that might otherwise purposefully defeat rights under ERISA-covered plans. The bills passed by the House and Senate purported to preempt only state laws relating to specific subjects covered by ERISA. The conference committee rejected these provisions as unduly narrow and instead enacted language designed to reserve regulation of the entire field of employee benefit plans to the federal scheme. In fact, the record of the committee's deliberations indicates that Section 510 was viewed as a critical component of the federal scheme; that Congress deliberately designed Sections 502, 510, and 514 to form an interrelated system for safeguarding employees' rights under plans; and that Section 514's "relate to" language was understood to subsume—and extend beyond—all subject matters regulated by ERISA, including the subjects addressed in Sections 510 and 502.

D. The preemption of state laws that, like Section 510, seek indirectly to protect rights under employee benefit plans by prohibiting employment actions taken for the purpose of defeating rights under those plans is consistent with, and indeed mandated by, the purpose of Section 514 of ERISA. Congress enacted that provision to save plans and plan sponsors from the administrative and financial burdens produced by multiple and potentially conflicting regulations. Allowing state-law based actions for wrongful interference with rights under plans would, however, potentially subject plan sponsors to multiple jurisdictional and procedural rules, different substantive standards of prohibited conduct, and far-reaching damages claims. As a consequence, plan sponsors would have a strong incentive to take actions detrimental to the interests of plan participants—by, for example, declining to establish plans, deciding to eliminate existing plans, or altering the design of plans to reduce the likelihood that interference-type claims will be asserted. In Section 510, Congress deliberately and carefully crafted the rights, procedures, and remedies so as not to discourage the creation and maintenance of employee benefit plans. The same cannot be said for the patchwork quilt of laws, procedures, and remedies that states might choose to impose. Accordingly, preemption is necessary.

E. The arguments advanced by respondent against preemption are without merit. That respondent is no longer seeking lost pension benefits as part of his remedy does not defeat preemption: his cause-of-action is still one that "relates to" an ERISA-covered plan and that is within the scope of Sections 502 and 510 of ERISA. Moreover, a law may "relate to" an ERISA-covered plan even though it imposes obligations only on the employer and does not directly require the payment of benefits or regulate the administrative activities of the plan. Many of ERISA's obligations—such as recordkeeping obligations and funding obligations—are imposed only on the employer. These obligations have a fundamental "connection with or reference to" the plans regulated by ERISA, and the states clearly cannot regulate the employer-activities to which those obligations are directly addressed. The same conclusion should be true for Section 510 and the employer-activities to which it (or any comparable state law) is addressed. Indeed, with the

exception of the court below, the federal and state appellate courts to address this issue have uniformly so concluded.

ARGUMENT

ERISA PREEMPTS A STATE COMMON LAW CLAIM THAT AN EMPLOYER HAS DISCHARGED AN EMPLOYEE IN ORDER TO INTERFERE WITH ATTAINMENT OF BENEFITS UNDER AN ERISA-COVERED PLAN

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). Specifically, in enacting ERISA, Congress wanted to ensure that the benefit promises that employers make are kept. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981). It thus devised a "comprehensive and reticulated" regulatory scheme which requires, among other things, that normal retirement benefits be earned—*i.e.*, "accrue"—more or less ratably during the period of employees' participation in a pension plan, that employees "vest" in their accrued benefits after a minimum service period, that employers make certain contributions to a trust to fund promised pension benefits on an actuarially sound basis, and that employees be protected against purposeful interference with attainment of their rights under the plan. *See Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980); *see also* 29 U.S.C. §§ 1052-1054, 1082, 1140.

The Supreme Court of Texas, by its decision below, has attempted to create an alternative set of rights and remedies available to an employee who claims that his employer has discharged him in order to prevent him from receiving promised pension benefits. The language, legislative history, and purpose of ERISA's preemption provision, however, make it clear that the Supreme Court of Texas has no authority to superimpose on ERISA its

own view of the appropriate rights and remedies available to employees in such situations.

A. The State Common-Law Claim Recognized By The Court Below "Relates To" An ERISA-Covered Plan Within The Meaning Of Section 514 Of ERISA

"[T]he question whether a certain state action is preempted by federal law is one of congressional intent. 'The purpose of Congress is the ultimate touchstone.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987) (citations omitted). As this Court has repeatedly observed, the purpose of Congres in enacting ERISA's preemption provision was the "reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans." *Id.* at 46. *See also Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 523. Thus, by the plain terms of Section 514(a), "the provisions of [ERISA] . . . supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a). The common-law claim recognized by the court below is plainly such a state law.

This Court has previously noted the "expansive sweep" of Section 514. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. at 47. It has held the provision applicable to state common-law as well as to state statutory claims. *See, e.g., id.* at 47-48; *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62 (1987). It has further held that "[t]he pre-emption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements" (*Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985)). Indeed, while acknowledging that the provision "gives rise to some confusion where, as here, it is asserted to apply to a state law ostensibly regulating a matter quite different from pension plans" (*Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 523,

524), the Court has "emphasized that the pre-emption clause is not limited to 'state laws specifically designed to affect employee benefit plans'" (*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. at 47-48), and that "even indirect state action . . . may encroach upon the area of exclusive federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 525. Specifically, the Court has held that a state law "relates to" an ERISA-covered plan and is preempted if it has "a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).

The state common-law claim recognized by the court below plainly "relates to" an ERISA-covered plan in this sense. Absent "reference to" petitioner's ERISA-covered pension plan, respondent simply would have no cause-of-action at all under Texas law.[4] Moreover, the purpose and effect of the Texas law is, as the Supreme Court of Texas admitted, to protect "employees' interests in pension plans" and to ensure that an employer cannot avoid "paying benefits under the employee's pension fund" (Pet. App. 5a). The Texas law thus seeks to insulate from wrongful interference the employee's right to attain benefits promised under an ERISA-covered pension plan—the very heart of the plan itself. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 510. Indeed, the law expressly seeks to protect vesting rights under an ERISA-covered plan—substantive rights that ERISA

[4] Respondent's claim under Texas law plainly depends on reference to petitioner's pension plan and, indeed, to its particular terms. Respondent claims that petitioner terminated him for the purpose of interfering with his vesting under the pension plan. Unbeknownst to respondent, however, he was fully vested under the pension plan at the time of his termination. Thus, the application of the plan's complex vesting provisions would be the focus of petitioner's defense, since the claim that the employer acted to deprive the employee of vesting is less credible when the employee was already vested at the time of the act. In this way, both the cause-of-action and the defense have a tangible and significant connection to an ERISA-covered plan: both depend on the existence of the plan and its particular terms.

itself requires the plan to afford to employees. As an enforcement mechanism for benefit rights brought into being by ERISA and provided by an ERISA plan,[5] the Texas law clearly "relates to" petitioner's ERISA-covered plan in its very essence and as applied to such plan must be preempted.[6]

B. The Structure Of ERISA Confirms That The Cause Of Action Recognized By The Court Below "Relates To" An ERISA-Covered Plan Within The Meaning Of Section 514 Of ERISA

That this Texas common-law "relates to" an ERISA-covered benefit plan is structurally confirmed by the provisions of ERISA that Section 514 states "shall supersede any and all state laws" relating to an ERISA-covered plan. 29 U.S.C. § 1144(a). The structure of these provisions reveals a deliberate effort to secure the rights of employees under pension plans against potential threats to enjoyment of those rights, including improper employer-interference with attainment of promised benefits. In other words, these provisions demonstrate that Congress understood that such laws "relate to" employee benefit plans covered by the statute.

[5] The remedy for violation of the Texas law may be back or front pay or other damages paid by the employer. *See* Pet. App. 5a n.3. But, as with any other law prohibiting a particular kind of employer-conduct, the purpose of the law is not to provide damages but rather to assure enjoyment of rights—here, pension rights. Assuring that employees receive rights under plans plainly "relates to" those plans.

[6] That the Texas law is preempted as applied in this case does not mean that it is preempted in all circumstances. ERISA does not apply to governmental plans, church plans, excess benefit plans, or certain payroll practices. *See* 29 U.S.C. § 1003(b); 29 C.F.R. § 2510.3-1(b). The Texas law could lawfully be applied to prevent alleged interference with attainment of benefits from any one of these sources, since the law would not in such circumstances "relate to" an ERISA-covered plan.

1. As explained above, the principal goal of Congress in enacting ERISA was to ensure that employee benefit promises made by employers are kept. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 510. To that end, Congress secured the right of employees to participate in pension plans. *See* 29 U.S.C. § 1052. Recognizing, however, that mere participation in plans would in many instances not secure rights to benefits if benefits could be forfeited upon termination of employment prior to normal retirement age, Congress further provided for vesting of employee rights after a specific period of service. *See* 29 U.S.C. § 1053. Likewise, recognizing that vesting would in many instances be nugatory if employers designed plans so as to postpone any meaningful accrual of benefits until attainment of retirement age, Congress also required that pension benefits be accrued more or less ratably over the period of an employee's anticipated participation in a plan. 29 U.S.C. § 1054. And, recognizing that vested and accrued pension benefits are of little value to employees if no monies exist to pay them, Congress provided that an employer must make periodic contributions to fund any promised pension benefits on an actuarially-sound basis. *See* 29 U.S.C. § 1082. Finally, Congress established the plan termination insurance program, including employer-liability to the Pension Benefits Guaranty Corporation for underfunded pension plans. *See* 29 U.S.C. § 1362.

In creating this comprehensive and interrelated scheme of plan protections, however, Congress was concerned that there remained at least one way in which an unscrupulous employer might attempt to defeat an employee's attainment of benefits under a pension or other benefit plan: by discharging the employee before he had accumulated the service or otherwise satisfied the eligibility conditions necessary for rights to vest under the plan. *See, e.g.*, 119 Cong Rec. 30044 (1973), *reprinted in* 2 *Legislative History of the Employee Retirement Income Security Act of 1974* ("*Legislative History*") (Comm. Print 1976), at

1640 (remarks of Sen. Hartke) ("Is there not a direct, positive incentive for every employer to fire a person when he reaches 29 years and 364 days of age?"). Although it considered avoiding the problem by mandating graduated vesting (so that an employer would have no incentive to terminate an employee prior to vesting), *see* S. Rep. No. 383, 93d Cong., 1st Sess. 20 (1973), *reprinted in* 1 *Legislative History* 1063, 1088, Congress ultimately decided to address the problem through the enactment of Section 510 of ERISA. *See* S. Rep. No. 127, 93d Cong., 1st Sess. 35-36 (1973), *reprinted in* 1 *Legislative History* 587, 621-622 ("These provisions were added by the Committee in the face of evidence that in some plans a worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions or violent reprisals."); 119 Cong. Rec. 30044 (1973), *reprinted in* 2 *Legislative History*, at 1641 (remarks of Sen. Javits) ("The Senator from New Jersey (Mr. Williams) and I have included an express amendment on that score which would provide a remedy for any person fired such as is provided for a person discriminated against because of race or sex, for example. That is section 699A [as Section 510 was then numbered].").

Among other things, Section 510 bars employers from taking adverse employment actions for the purpose of interfering with an individual's attainment of benefits under a plan. *See* 29 U.S.C. § 1140. Section 510 prevents employers from circumventing, and thus gives meaning to, the vesting and other minimum standards established for and contained in pension plans. *See* 119 Cong. Rec. 30400 (1973) *reprinted in* 2 *Legislative History*, at 1836 (remarks of Sen. Hartke) ("The key to effective pension reform is early vesting, but a vesting provision is no better than the protection employees have against improper discharge—including layoff—discipline or other discrimination that puts an employee out of a job before vesting is achieved, thereby defeating his pension

claim."). In addition, it protects the attainment of rights under employee welfare benefit plans. *See, e.g.*, Vogel, *Containing Medical And Disability Costs By Cutting Unhealthy Employees: Does Section 510 Of ERISA Provide A Remedy?*, 62 Notre Dame L. Rev. 1024 (1987). The Congress enacting Section 510 must have understood it to "relate to" the plans that ERISA was seeking to protect and regulate.[7]

2. That Congress understood Section 510—and thus any comparable state law—to "relate to" ERISA-covered plans is conclusively confirmed by the parallel provision added to the Internal Revenue Code by Section 1012(a) of Title II of ERISA. *See* 120 Cong. Rec. 8861 (1974), *reprinted in* 3 *Legislative History*, at 4273 (comparing Section 510 and parallel Code provisions). Under that provision, which appears as Section 411(d)(1) of the Code, a plan may be required to provide an accelerated vesting schedule if "there has been a pattern of abuse under the plan (such as dismissal of employees before their accrued benefits become nonforfeitable) tending to discriminate in favor of employees who are highly compensated . . . ." 26 U.S.C. §411(d)(1)(A). *See also* H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 276-277 (1974), *reprinted in* 3 *Legislative History* 4277, 4543-4544; H.R. Rep. No. 779, 93d Cong., 2d Sess. 63 (1974), *reprinted in* 2 *Legislative History* 2584, 2652. Such a direct regulation of the terms of a plan by a parallel provision of Title II of ERISA demonstrates that Congress understood Section 510, and thus any comparable state law, indirectly to have this relation to the plan as well.

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[7] Because of the obvious comparability between ERISA Section 510 and the Texas law, respondent has the unenviable task of persuading the Court that Section 510 does not "relate to" employee benefit plans—a proposition utterly at odds with the "common sense view" that has principally guided the Court in ERISA preemption cases. *See Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. at 740; *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. at 47, 48, 50.

3. Finally, there is one other structural indication that Congress understood Section 510 and any comparable state law to "relate to" ERISA-covered employee benefit plans. Section 510 provides that its terms are to be enforced pursuant to the provisions of Section 502 of ERISA. *See* 29 U.S.C. § 1140. Like the Texas law, Section 502 provides employment-related remedies such as reinstatement, back pay, front-pay, and damages equal to lost benefits for violations of Section 510 as a deterrent to ensure the payment of benefits under plans. *See, e.g.*, *Kross v. Western Electric Co.*, 701 F.2d 1238, 1244 n.7 (7th Cir. 1983); *Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1015-1020 (W.D. Mo. 1984).

Importantly, in *Pilot Life Ins. Co. v. Dedeaux*, this Court held that interpretation of the provisions of Section 514 of ERISA—in that case, the so-called "savings clause" in Section 514(b)(2)(A)—"must be informed by the legislative intent concerning the civil enforcement provisions" of Section 502. 481 U.S. at 52. The Court reasoned (*id.* at 52, 54) that "[t]he civil enforcement scheme of § 502(a) is one of the essential tools for accomplishing the stated purposes of ERISA," and that "varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress." Thus, it held that the state law at issue in that case—a tort for alleged improper processing of benefits—must be preempted because it overlaps with a claim within the scope of Section 502. *See id.* at 57.

A state law like the one adopted in this case by the Supreme Court of Texas must similarly be preempted: It adds to the remedies available under Section 502 for a claim relating to purposeful interference with attainment of benefits under a plan, and thus "completely undermines" "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme . . . ." *Id.* at 54. This is all the more true where the state law, as here, seeks to protect and

enforce substantive rights under a plan which were not created—and cannot be created—by state law.

C. The Legislative History Of ERISA Confirms That A State Law Making It Unlawful To Discharge An Employee For The Purpose Of Interfering With Attainment Of Pension Benefits "Relates To" A Plan And Is Preempted

The legislative history of ERISA confirms that a state law making it unlawful to discharge an employee for the purpose of interfering with attainment of pension benefits "relates to" ERISA-covered plans and is preempted. Specifically, the legislative history shows that Congress viewed Section 510 as an indispensable component of its comprehensive scheme for the protection and regulation of employee benefit plans; that Sections 502, 510 and 514 were intended to comprise a single interrelated and exclusive enforcement scheme to protect rights under plans against improper interference; and that, as ultimately formulated, Section 514 was understood to preempt, at a minimum, any state law attempting to regulate the subject matters treated by ERISA.

1. The bill that eventually became ERISA, H.R. 2, was first introduced in the House by Representative Dent on January 3, 1973. *See* H.R. 2, 93d Cong., 1st Sess. (1973), *reprinted in* 1 *Legislative History* 3. That bill did not contain any provision like Section 510 of ERISA. Moreover, while it contained a limited civil enforcement section, it allowed participants or beneficiaries to institute civil actions in either state or federal court. *See* 1 *Legislative History*, at 34. Finally, it preempted state laws only "insofar as they may now or hereafter relate to the fiduciary, reporting, and disclosure responsibilities of persons acting on behalf of employee benefit plans." *Id.* at 50-51.

On August 2, 1973, Representative Dent introduced H.R. 9824 as an alternative to H.R. 2. *See* H.R. 9824, 93d Cong., 1st Sess. (1973), *reprinted in* 1 *Legislative History* 686. Like H.R. 2, H.R. 9824 did not contain a

provision like Section 510 of ERISA. Moreover, like H.R. 2, H.R. 9824 authorized civil actions to be brought in either state or federal court. 1 *Legislative History* at 769-770. But H.R. 9824 did expand the remedies available in such actions to include, as ERISA now authorizes, injunctions against "any act or practice which violates any provision of this Act." *Id.* at 769. Moreover, it expanded the preemption provision to encompass both state laws that "may now or hereafter relate to the reporting and disclosure responsibilities of persons acting on behalf of employee benefit plans," and state laws "insofar as they may now or hereafter relate to the vesting of participant's benefits in employee benefit plans, the funding requirements for employee benefit plans or the adequacy of financing of employee benefit plans," and "affect the fiduciary responsibilities of those dealing with the plan and such laws conflict with any provision of this Act." *Id.* at 776-777.

On October 2, 1973, the House Committee on Education and Labor reported H.R. 2 with an amendment that essentially replaced the bill as introduced. *See* H.R. 2, 93d Cong., 1st Sess. (1973), *reprinted in* 2 *Legislative History* 2181. As reported, the civil action provision of H.R. 2—Section 503—was substantially the same as the civil action provision of H.R. 9824. *See* 2 *Legislative History*, at 2331-2338. As reported, the preemption provision of H.R. 2—Section 514(a)—was substantially the same as the preemption provision of H.R. 9824, except that it preempted all state laws addressing fiduciary responsibilities, whether they conflicted with ERISA's provisions or not. *See* H.R. Rep. No. 533, 93d Cong., 1st Sess. 17, *reprinted in* 2 *Legislative History* 2348, 2364. Finally, as reported, H.R. 2 for the first time included among its "Enforcement" rules a provision stating (H.R. 2, 93d Cong., 1st Sess. 161, *reprinted in* 2 *Legislative History* 2181, 2341) that:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right

> to which he is entitled under the provisions of the plan or this Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, or this Act. The provisions of section 503 shall be applicable in the enforcement of this section.

The committee report accompanying the bill described this provision as necessary "to completely secure the rights and expectations brought into being by this legislation." H.R. No. 533, 93d Cong., 1st Sess. 17 (1973), *reprinted in* 2 *Legislative History*, at 2364.

While H.R. 2 was awaiting floor action, the Committee on Education and Labor reported out yet another bill, H.R. 12906. *See* H.R. 12906, 93d Cong., 2d Sess. (1974), *reprinted in* 2 *Legislative History* 2761. The civil enforcement and non-interference with protected rights provisions of H.R. 12906 were nearly identical to the comparable provisions in H.R. 2. *See* 2 *Legislative History*, at 2916-2917. The preemption provisions of H.R. 12906, however, were reorganized to preempt state laws insofar as they "relate to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan to which part 1 applies," and "insofar as they may now or hereafter relate to the nonforfeitability of participant's benefits in employee benefits plans, . . . the funding requirements for such plans, the adequacy of financing of such plans, portability requirements for such plans, or the insurance of pension benefits under such plans." *See* 2 *Legislative History*, at 2921-2922.

On February 26, 1974, the House considered both H.R. 12906 and H.R. 12855, a bill reported out of the Ways and Means Committee. It consolidated the two bills into a new H.R. 2, and passed that bill by a vote of 376 to 4 on February 28, 1974. As passed, the relevant provisions of H.R. 2—Sections 503, 510, and 514—were identical to the provisions of H.R. 12906. *See* H.R. 2, 93d Cong., 2d Sess. (1974), *reprinted in* 3 *Legislative History* 3898, 4047, 4053-4054, 4057-4058. Thus, as passed, H.R. 2 included among its benefit plan protections a provision making it unlawful for an employer purposefully to interfere with attainment of rights under plans; allowed that provision to be enforced in either federal or state court; and preempted only certain specifically designated subjects regulated by ERISA.

2. The principal pension reform bill considered in the Senate, S. 4, was introduced by Senator Williams on January 4, 1973. *See* S. 4, 93d Cong., 1st Sess. (1973), *reprinted in* 1 *Legislative History* 93. As was the case with the initial bill introduced in the House, S. 4 did not contain any provision comparable to Section 510 of ERISA. Moreover, Section 603 of S. 4 contained a broad civil enforcement provision entitling any participant or beneficiary to sue in state or federal court for "appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation or duty of a fiduciary . . . ." 1 *Legislative History*, at 183-184. Section 604 entitled a participant or beneficiary to sue in state or federal court "to recover benefits due him . . . or to clarify his rights to future benefits under the terms of the plan . . . ." *Id.* Finally, Section 609 of S. 4 provided that, except for actions to recover benefits or clarify benefit rights, "the provisions of this Act . . . shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act . . . ." 1 *Legislative History*, at 186-188. A summary of the bill stated that Section 609 "provides that this Act supersedes state laws covering the same matters." *Id.* at 201.

On April 18, 1973, S. 4 was reported out of the Senate Committee on Labor and Public Welfare. S. 4, 93 Cong., 1st Sess. (1973), *reprinted in* 1 *Legislative History* 389. The civil enforcement provisions of the reported bill were essentially the same as the provisions of S. 4 as

introduced. *Id.* at 579-581. The preemption provision of the reported bill was identical in all relevant respects to Section 609 of the bill as introduced. *Id.* at 582-583. As reported, however, S. 4 provided as part of its "Enforcement" rules (1 *Legislative History*, at 585) that:

> Sec. 610. It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of the plan, this Act, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this Act, or the Welfare and Pension Plans Disclosure Act. The provisions of sections 602 [suits by the Secretary] and 603 shall be applicable. . . .

The Committee had heard testimony about instances in which employers had discharged employees to prevent them from vesting under plans. *See Retirement Income Security For Employees Act, 1973: Hearings on S. 4 and S. 75 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 93d Cong., 1st Sess. 350 (1973). The committee report stated that Section 609 was thus necessary "to completely secure the rights and expectations brought into being by this landmark reform legislation." S. Rep. No. 127, 93d Cong., 1st Sess. 36 (1973), *reprinted in* 1 *Legislative History* 587, 622.

On August 21, 1973, the Senate Finance Committee reported on S. 1179 as an alternative to S. 4. *See* S. 1179, 93d Cong., 1st Sess. (1973), *reprinted in* 1 *Legislative History* 780. This bill contained a provision for civil actions for breach of fiduciary duty. 1 *Legislative History*, at 950. The bill also authorized the Secretary of Labor to "hear and decide" disputes between participants or beneficiaries and plan administrators with respect to present and future benefits under the plans. *Id.* at 952. As discussed *supra* at 22-23, however, this bill provided for

graduated vesting and contained neither a preemption provision nor a non-interference provision.

On September 17, 1973, Senators Nelson, Long, Bennett, and Bentsen introduced Amendment 496 as a compromise between S. 4 and S. 1179 and as a substitute for S. 4. *See* Amendment No. 496, 93d Cong., 1st Sess. (1973), *reprinted in* 1 *Legislative History* 1271. The civil action provisions of this substitute bill—Section 693 and 694—were identical in all relevant respects to Sections 603 and 604 of S. 4 as originally reported. 1 *Legislative History*, at 1490-1492. Similarly, the preemption provision of the substitute bill—Section 699(a)—was identical to Section 609 of the bill as originally reported. *Id.* at 1493-1494. Finally, Section 699A, which addressed interference with employee rights, was substantially the same as Section 610 of the bill as originally reported (except that it added a prohibition against retaliation for testifying in any proceeding relating to the Act). *Id.* at 1496.

On September 19, 1973, the Senate took up consideration of this substitute bill. Senator Hartke applauded Section 610 of S. 4 as originally reported on the ground (119 Cong. Rec. 30374-75 (1973), *reprinted in* 2 *Legislative History*, at 1774-1775) that "[n]o vesting formula will produce real employee protection so long as employers are free to fire employees to defeat pension eligibility." He argued, however, that these claims should be heard by "an administrative tribunal with some expertise in the subject," and thus offered an amendment that would have authorized and directed the Secretary of Labor to hear and decide such disputes. *See* 119 Cong. Rec. 30400, *reprinted in* 2 *Legislative History*, at 1835-1836. Senator Williams, one of the two principal sponsors of the bill, agreed (*id.* at 1775-1776) that a non-interference provision was essential and pointed out (*id.*) that such a provision had been included in the bill. He thus concluded (*id.*) that "[t]he rights of the workers are

fully protected under this bill"; and he objected (*id.* at 1776, 1837) that the proposed administrative tribunal amendment would create an expensive new layer of "bureaucracy" and might lead to the "defeat [of] the present system of private pension plans that are on a voluntary basis."

The Senate agreed with Senator Williams, rejected Senator Hartke's proposed amendment, and, after other amendments and modifications not relevant here, passed the substitute bill (renumbered as H.R. 4200). *See* 119 Cong. Rec. 30428, *reprinted in* 2 *Legislative History*, at 1881-1882. As passed, the bill included a non-interference provision among its "Enforcement" provisions; authorized that provision to be enforced in either federal or state court; and, in contrast to the House bill, preempted state laws on all subjects addressed in ERISA.

3. A conference committee convened and agreed to retain the provisions authorizing civil actions by participants and beneficiaries, but decided to limit state court jurisdiction to actions involving claims for benefits and to confer exclusive jurisdiction on the federal courts over all other ERISA actions. *See* H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 75-77 (1974), *reprinted in* 3 *Legislative History* 4277, 4350-4352. The conference committee also agreed to retain in the bill's "Enforcement" provisions both a prohibition against interference with attainment of an employee's benefits and a requirement that the statute's civil action provisions be used in enforcing that prohibition. *See* 3 *Legislative History*, at 4350, 4355. Finally, the conference committee agreed to omit any reference to preemption of particular areas of regulation and instead to provide that state laws are preempted to the extent that they "relate to any employee benefit plan"; and the conference committee did so in the face of objections by the Administration that the preemption provisions of the House and Senate bills were "extremely vague" and "too broad," respectively. 3 *Legislative History*, at 4357; *Administration Recommendations to the House and Senate Conferees on H.R. 2 to Provide for Pension Reform* (April 1974), *reprinted in* 3 *Legislative History* 5047, 5145-5146.

4. In the ensuing floor debate, key members of Congress made clear the effect of the conference committee's actions. In the House, Representative Dent stated:

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation . . . .
>
> The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof—including any professional society or association operating under code of law—which would affect any employee benefit plan described in section 4(a) and not exempt under section 4(b).

120 Cong. Rec. 29197 (1974), *reprinted in* 3 *Legislative History*, at 4670-4671.

Similarly, in the Senate, Senator Williams, after describing the various civil actions available to participants or beneficiaries under Section 502, stated (120 Cong. Rec. 29933 (1974), *reprinted in* 3 *Legislative History*, at 4745-4746):

> A further protection for employees is the prohibition against discharge, or other discriminatory conduct toward participants and beneficiaries which is designed to interfere with attainment of vested benefits or other rights under the bill, or to discourage

the exercise of any rights afforded by the legislation . . . .

It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law . . . .

Finally, Senator Javits remarked (120 Cong. Rec. 29935 (1974), *reprinted in* 3 *Legislative History*, at 4751) that:

The conference report represents a series of fundamental guarantees made to every American worker —guarantees which will secure for millions of Americans the expectation of a decent retirement income in combination with social security. These guarantees are nothing less than a pension "bill of rights" to which every worker—regardless of his occupation, salary or status—is entitled.

While the new law does not require employers to install a private pension plan, it would for the first time provide the following 14 basic rights to those working for an employer with a private pension plan.

He listed (*id.* at 4751-4753) under separate headings the basic minimum standards of ERISA with regard to participation, vesting, accrual, and so forth; and the fourteenth right listed (*id.* at 4753) was "Protection Of Pension Rights Against Employer Or Union Interference":

Every employee is to have the right, enforceable by the Secretary of Labor, to be free from interference with his pension benefits. This means that he cannot be discharged, fined, suspended, expelled or otherwise interferred with in order to prevent him from receiving pension benefits or attaining eligibility for pension benefits. There are stiff criminal penalties if this type of interference takes the form of force, fraud or violence or threats of this nature.

These 14 guarantees to American workers are at the heart of pension reform and provide much-needed and long-denied protections.

Senator Javits then concluded (120 Cong. Rec. 29942 (1974), *reprinted in* 3 *Legislative History*, at 4770-4771) that:

Both House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.

Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs.

5. This legislative history confirms that, in enacting Section 514, Congress understood that ERISA would preempt, among other things, any state law that, like Section 510 of ERISA, seeks indirectly to protect employee benefit rights by prohibiting employment decisions that might otherwise purposefully defeat employee benefit rights under ERISA-covered plans. As this Court has noted, "[t]he bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA."

Shaw v. Delta Air Lines, Inc., 463 U.S. at 98. As the Court has also noted, however, "[t]he Conference Committee rejected these provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language." *Id.* at 98. There is no basis in the legislative history for suggesting that, in so expanding the scope of the preemption clause, the conference committee intended to allow state regulation of specific subjects covered by ERISA—such as Section 510's coverage of actions that purposefully "interfere" with attainment of benefits under a plan. On the contrary, the legislative history outlined above proves conclusively that Section 510 was viewed as a critical component of ERISA's minimum standards for plans, and indeed, was described as one of the "14 basic rights" conferred by ERISA; that Congress deliberately designed Sections 502, 510 and 514 to form an interrelated system for safeguarding employee rights under plans; and that Section 514's "relate to" language was understood to encompass, among other things, all subject matters regulated by the bill's "substantive and enforcement provisions"—such as the subject matters regulated by Sections 510 and 502 of ERISA.

D. Allowing State-Law Based Actions For Alleged Interference With Attainment Of Benefits Under ERISA-Covered Plans Would Impermissibly Burden The Maintenance Of Such Plans

The preemption of state laws that, like Section 510, seek indirectly to protect employee benefit rights by prohibiting employment decisions made for the purpose of defeating employee benefit rights is consistent with, and indeed mandated by, the purposes of Section 514 of ERISA. As the legislative history makes clear, Congress enacted that provision, and thereby preempted the field of employee benefit plan regulation, in order to save plans and plan sponsors from the administrative and financial burdens produced by multiple and potentially

conflicting regulations. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 105 & n.25; *see also Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9-10 (1987). Allowing state law-based actions for alleged interference with attainment of benefits under ERISA-covered plans, however, would subject plans and plan sponsors to the precise burdens from which Congress sought to spare them.

On a procedure level, allowing such state-law based actions would potentially subject plan sponsors to multiple jurisdictional and procedural rules for similar kinds of interference claims. Whereas ERISA mandates that Section 510 actions be subject to the exclusive jurisdiction of the federal courts, state law-based actions of this type would be subject to no such limitation and could be filed in state courts; indeed, using state agencies, the states could establish the very administrative machinery for resolution of such claims that Congress rejected in ERISA as unduly burdensome. In addition, whereas ERISA requires that the Secretaries of Labor and Treasury be formally notified of Section 510 actions and allowed to intervene at their option, no such requirement exists for claims that may be filed under state law. Finally, whereas ERISA apparently anticipates that Section 510 claims will be tried by a court, *see Pane v. RCA Corp.*, 868 F.2d 631, 635-637 (3d Cir. 1989), similar if not identical state law-based claims may be subject to trial by jury. *See K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1372-1373 (Nev. 1987).

On a substantive level, allowing state law-based actions of this type would mean that different substantive standards could potentially be applicable to the same employer conduct. For example, whereas an employer's decision is unlawful under Section 510 only if taken "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan," the court below ruled (Pet. App. 5a) that the employer's decision is unlawful if "the principal reason" for it is a "desire to avoid" paying benefits; and while

it is unclear what the court's formulation will ultimately come to mean, it appears, as Justice Cook noted in dissent below (Pet. App. 10a), that the Texas standard allows an individual to avoid summary judgment on the basis of evidence that plainly would not be sufficient to state a triable claim under Section 510 of ERISA. Moreover, under the decision below (Pet. App. 5a), an employer's desire to avoid *contributing to* a pension fund is apparently sufficient to state a violation of Texas law (even if the employer's purpose was not to interfere with the attainment of benefits), thus raising the prospect that a reduction-in-force for valid economic reasons would violate Texas comon law if the savings were principally in pension funding costs; this is a gross variance from the substantive requirements of ERISA Section 510, and is a clear invasion of the separate funding requirements of ERISA. Other states could alter the substantive standards applicable to Section 510-type claims even further—and in vastly different ways.[8]

[8] Indeed, to appreciate the vista of mischievous state action that is possible here, one need only imagine decisions in which state courts decide to accept claims that federal courts have rejected under Section 510. *See, e.g., Hughes v. General Motors Corp.*, 852 F.2d 568, 1988 U.S. App. LEXIS 9637 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1535 (1989) (no violation of Section 510 where employer offered early retirement benefits to other employees shortly after plaintiffs voluntarily retired); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987) (no violation of Section 510 to provide shutdown pensions to employees who lost their jobs due to a sale but not to those who transferred to the employ of the buyer); *West v. Greyhound Corp.*, 813 F.2d 951 (9th Cir. 1987) (no violation of Section 510 where buyer refused to hire employees of seller unless they agreed to less generous employee benefits); *Bass v. Retirement Plan of Conoco, Inc.*, 676 F. Supp. 735 (W.D. La. 1988) (no violation of Section 510 where seller offered improved pension benefits to employees who remained after the sale but not to those who transferred to the employ of the buyer and had only deferred vested interests in seller's plan); *Nemeth v. Clark Equipment Co.*, 677 F. Supp. 899 (W.D. Mich. 1987) (no violation of Section 510 where pension cost was not a "but for" cause of employer's decision to close one plant rather than another); *International Union UAW Local 91 v. Park-Ohio Industries, Inc.*, 661 F. Supp. 1281 (N.D. Ohio 1987) (no violation of Section 510 where award of benefits distinguished between those who retired before or after a specific date).

Finally, on a remedial level, allowing state law-based actions of this type would expose plan sponsors to a variety of sanctions that ERISA apparently does not authorize. ERISA limits the remedies available in Section 510 cases to equitable relief such as reinstatement, back pay, front pay, and damages equal to lost benefits. *See Kross v. Western Electric Co.*, 701 F.2d 1238, 1244 n.7 (7th Cir. 1983); *Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1015-1020 (W.D. Mo. 1984). It apparently does not allow for punitive and emotional distress damages awards. *See Varhola v. Doe*, 820 F.2d 809, 817-818 (6th Cir. 1987). By contrast, similar if not identical state law-based claims could lead to awards for emotional distress and punitive damages. *See, e.g., K Mart Corp. v. Ponsock*, 732 P.2d at 1373.

State law-based causes-of-action of these types—imposing potentially different substantive standards of conduct, with different procedural and proof requirements, as well as possible jury trials and punitive damages—would, contrary to the purposes of Section 514, have serious consequences for the participants of employee benefit plans. Plan sponsors seeking to avoid the lawsuits and concomitant administrative and financial burdens flowing from such a myriad of laws could simply decline to establish plans, or to eliminate any plans that they currently have in existence. Alternatively, they could delay terminating employees until after any benefit rights have vested; but, in doing so, they would be subjecting the plans to unanticipated financial demands and thus exposing other plan participants and beneficiaries (conceivably in all 50 states) to increased risks of non-payment. Finally, the plan sponsors could change the vesting or

qualification rules of the plans so as to decrease the likelihood of interference-type claims being asserted—either by increasing the years-of-service required to qualify for benefits (and thereby reducing the likelihood that a terminated employee would be close to qualifying for benefits), or by decreasing the years-of-service needed to qualify for such benefits (and thereby increasing the likelihood that a terminated employee would already have qualified for the benefits). In doing so, however, the plan sponsors would effectively be denying some employees benefits that they otherwise would have been eligible to receive, or be increasing the risk of non-payment to other plan participants (or requiring a reduction in the per-capita level of benefits provided to all participants). In short, allowing such laws to be imposed could lead plan sponsors to take actions seriously detrimental to the interests of some or all plan participants.[9]

Of course, as Congress recognized in enacting ERISA, the minimum standards of the statute, including Section 510, impose burdens of a similar kind and may lead plan sponsors to take comparable actions in response. *See, e.g.*, S. Rep. No. 383, 93d Cong., 1st Sess. 19 (1973), *reprinted in* 1 *Legislative History* 1063, 1087. But, as this Court recognized in *Pilot Life*, in enacting these minimum standards (including Section 510), Congress carefully

[9] An example readily illustrates this point. An employer in an industry where there is rapid turnover of employees within the first two years of employment, but relatively little thereafter, might wish to design its pension plan with 2-year cliff vesting. If this employer were located in Texas, however, and every termination within the first two years of employment raised the spectre of a state court action, tried before a jury, with a claim for punitive damages, then the employer likely would resort either to 5-year cliff vesting, so as to minimize the credibility of claims of employees who were terminated within the first two years, or to full and immediate vesting, so as to avoid the risk altogether. Alternatively, the employer might erect an artificial barrier to termination in Texas where the employee is close to vesting under the pension plan.

fashioned the substantive rights, the procedures, and the available remedies so that the burdens thereby created would be tolerable when balanced against the protections afforded to employees. *See* 481 U.S. at 54. *See also Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). Congress carefully avoided creating rights, procedures, or remedies that would "force employers to end their plans or perhaps discourage other employers from beginning them." 120 Cong. Rec. 29209 (1974), *reprinted in* 3 *Legislative History*, at 4703-4704 (remarks of Rep. Collier). *See also* 120 Cong. Rec. 29951 (1974), *reprinted in* 3 *Legislative History*, at 4797 (remarks of Sen. Bentsen) ("The legislation achieves a fair balance between the need to provide adequate protection to existing pension plan participants and the important need to expand pension coverage. The legislation does this by setting minimum standards—not ideal standards—which would not impose such severe costs on employers so as to discourage the creation of new plans or actually force the termination of some existing plans."). The same cannot be said for the Texas law or whatever patchwork quilt of laws, procedures, and remedies other states might choose to impose. And that is precisely why Section 514 was enacted and must be applied to preempt laws of this type.[10]

E. The Arguments Advanced Against Preemption Are Without Merit

In his brief-in-opposition to the petition for certiorari, respondent strives mightily to avoid the inevitable conclusion that flows from the language, legislative history, and purpose of Section 514. But the arguments that he musters against preemption are without merit.

[10] As this Court has recognized, ERISA preemption was designed to free employers from the need to either reduce multistate plans to the lowest common denominator or establish separate plans for each state. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 514, 524-525; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 105; *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 10-13.

1. Mimicking the Supreme Court of Texas (Pet. App. 5a n.3), respondent first argues (Opp. Br. 6-7) that he is not seeking lost pension benefits and that "this fact alone is sufficient to defeat preemption." Of course, this argument conveniently ignores respondent's prayer in the trial court that, if successful, he be awarded "loss of employee benefits and profit sharing and retirement programs . . . ." J.A. 6, 15, 68. More importantly, however, this argument ignores the Court's conclusion in *Pilot Life* that ERISA-preemption extends beyond claims for benefits—specifically, that ERISA-preemption extends, at a minimum, to any claim that is redressable under Section 502 of ERISA. *See* 481 U.S. at 52-57 (preemption of state common law action seeking punitive damages for improper processing of a disability benefits claim). A claim for alleged interference with attainment of benefits fits squarely into the category of claims so redressable.

2. Respondent alternatively argues (Opp. Br. 7-18) that preemption is inappropriate because the Texas law regulates only the employment relationship between himself and petitioner, and neither requires the payment of benefits nor regulates the administrative activities of petitioner's pension plan. This argument is unfounded.

A state law may "relate to" an employee benefit plan, and thus be preempted by ERISA, even though it in terms regulates only the employment relationship (and not the terms or the administrative activities of the benefit plan). Just like Section 510 of ERISA, a state law may seek indirectly to protect employee benefit rights by directly regulating the employment relationship—i.e., by prohibiting employment decisions that might otherwise defeat employee benefit rights under a plan. Where the state law does so by "reference to" an ERISA-covered benefit plan, the law "relates to" an ERISA-covered plan and is preempted.[11]

[11] This case thus does not present the problem posed in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), where the Court held that a state law requiring plant closure severance payments neither related to an existing employee benefit plan nor called an ERISA-covered plan into being. The Texas law in this case, by its own terms, relates to an existing ERISA-covered pension plan.

Contrary to respondent's argument, a law may "relate to" an ERISA-covered plan and be preempted even though it directly imposes obligations on only the plan sponsor (*i.e.*, the employer). Many of ERISA's obligations are imposed only on the plan sponsor. *See, e.g.*, 29 U.S.C. § 1021(d)(1) (requiring employer to notify plan participants and beneficiaries if it fails to make a payment required to meet minimum funding standards); 29 U.S.C. § 1059(a) (requiring employer to maintain records with respect to employees and to furnish information to the plan administrator); 29 U.S.C. § 1082(c) (requiring employer to make minimum contributions to the plan); 29 U.S.C. § 1082(f) (imposing a lien for unpaid contributions on all property and rights to property of the employer); 29 U.S.C. § 1085b (requiring employer to post security for any increase in benefits when a plan is seriously underfunded); 29 U.S.C. § 1166(2) (requiring employer to notify plan administrator of events that qualify an employee, spouse, or dependent for continuation of health coverage); 29 U.S.C. § 1363 (imposing liability on the employer when an insufficiently funded plan is terminated); 29 U.S.C. § 1381 (imposing withdrawal liability on an employer that incurs a complete or partial withdrawal from a multiemployer plan). These disclosure, funding, and other obligations quite plainly "relate to" ERISA-covered plans, and the states clearly cannot regulate the employer-activities to which those obligations are directly addressed. The same conclusion should be true for Section 510 and the employer-activities to which it is directly addressed.

A law simply need not directly require the payment of benefits or regulate the administrative activities of the plan in order to "relate to" an employee benefit plan.

As this Court has repeatedly stated, "even indirect state action . . . may encroach upon the area of exclusive federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 525. Thus, the disclosure and funding rules cited above "relate to" employee benefit plans even though they do not directly require the payment of benefits or regulate the administrative activities of the plan. Similarly, the state statute at issue in *Metropolitan Life Ins. Co. v. Massachusetts*, which required insurance carriers—*i.e.*, third-parties—to include certain provisions in group insurance policies that they sold, "related to" ERISA-covered plans even though it did not directly require the payment of benefits or regulate the administration of claims. 471 U.S. at 739. Likewise, the statute held preempted in *Mackey v. Lanier Collections Agency & Service, Inc.*, which barred garnishment of benefits from ERISA-covered plans, "related to" such plans even though it did not require the payment of any benefit or actually impose an administrative requirement on such plans. 486 U.S. 825, 837-838 (1988). The Texas law at issue is similarly not exempt from preemption simply because it regulates the field of employee benefit plans in an indirect manner.

Indeed, the overwhelming number of federal and state appellate courts to address the specific question presented by this case have drawn this conclusion. With the exception of the court below, those courts have *uniformly* found that state non-interference laws like that of the State of Texas "relate to" ERISA-covered plans and are preempted. *See Fitzgerald v. Codex Corp.*, 882 F.2d 586, 588 (1st Cir. 1989); *Pane v. RCA Corp.*, 868 F.2d 631, 639 (3d Cir. 1989); *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 799-800 (9th Cir. 1987); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1215-1216 (8th Cir.), *cert. denied*, 454 U.S. 968 and 454 U.S. 1084 (1981); *Conaway v. Eastern Associated Coal Corp.*, 358 S.E.2d 423, 427 (W. Va. 1986); *Coontz v. Gordon Jewelry Corporation*, 439 N.W.2d 223, 226 (Iowa App. 1989). This

judicial consensus is deserving of the Court's endorsement here.[12]

CONCLUSION

The judgment of the court below should be reversed and remanded.

Respectfully submitted,

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JUNE 1990

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[12] This judicial consensus stands in harmony with the cases cited by respondent in his brief-in-opposition (at 17-18). In those cases, the termination of employment was alleged to have violated state law for reasons entirely unrelated to any alleged intent to interfere with the attainment of rights under an employee benefit plan; loss of benefits was nothing more than a consequence of the termination and thus did not "relate to" the underlying plan. Those cases do not bear on cases such as this one—where the termination is alleged to violate a state law that expressly references and depends on the existence of an employee benefit plan, was created for the purpose and with the effect of protecting and enforcing an employee's rights under an employee benefit plan, and creates rights and remedies that encroach upon the comprehensive and exclusive scheme for enforcement under ERISA Sections 510 and 502.

BEST AVAILABLE COPY

QUESTIONS PRESENTED

(1) Whether the Employee Retirement Income Security Act of 1974 ("ERISA") pre-empts a state's judicially created cause of action, grounded on public policy, for recovery of damages for wrongful discharge of a non-governmental employee, which discharge was motivated by the employer's intent to avoid future pension plan obligations, when none of the damages claimed or relief sought includes any pension plan benefits or rights under the plan itself.

(2) Whether Petitioner has waived any right to raise or rely on any such alleged "ERISA" pre-emption by failing to properly and timely raise such issue below.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were: Perry McClendon and the Ingersoll-Rand Company. Mr. McClendon has no interest in any corporate entity or partnership.

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No. 89-1298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY McCLENDON,
Respondent.

On Writ of Certiorari to the Supreme Court of Texas

BRIEF FOR THE RESPONDENT

Perry McClendon respectfully submits this brief on the merits and prays that this Honorable Court affirm the Texas Supreme Court's judgment.

OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at 779 S.W.2d 69 (Tex. 1989). The opinion of the 14th Court of Appeals of Texas is reported at 757 S.W.2d 816. The opinion of the 133rd Judicial District Court of Harris County, Texas is unreported.

STATUTORY PROVISIONS INVOLVED

Section 1001 of ERISA provides in pertinent part as follows:

> (a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect

> to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.
>
> (b) Protection of interest commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries. It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Section 502 of ERISA, 29 U.S.C. § 1132, provides in relevant part as follows:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought—
>
> (1) by a participant or a beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

Section 510 of ERISA, 29 U.S.C. § 1140, provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given

information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Section 514 of ERISA, 29 U.S.C. § 1144, provides in pertinent part as follows:

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003 (a) of this title and not exempt under section 1003 (b) of this title. This section shall take effect on January 1, 1975.

* * * * *

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Texas Rule of Civil Procedure 94 provides as follows:

Rule 94. Affirmative Defenses

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbi-

tration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issue unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability; provided that nothing herein shall be construed to change the burden of proof on such issue as it now exists.

Federal Rule of Civil Procedure 8(c) provides as follows:

> (c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

STATEMENT OF THE CASE

This is a wrongful employment termination case which presents no federal question. Respondent makes no claims for pension benefits, and there are no issues with respect to the administration or regulation of a pension plan. Shortly after the litigation began, Petitioner, Ingersoll Rand, vested Mr. McClendon's pension. Since that time, Respondent has pursued only his claims for damages arising out of the wrongful termination of his employment.

Petitioner induced Mr. McClendon to uproot his family to move to a strange city in order to expand Ingersoll Rand's sales territory. Once Mr. McClendon pioneered a new territory and was about to earn substantial commissions, Ingersoll Rand fired him four months before his ten year pension vesting anniversary. Suit was then filed in the 133rd Judicial District Court of Harris County, Texas, alleging, among other things, a Texas state cause of action for wrongful employment termination and breach of an implied covenant and/or duty of good faith and fair dealing. Shortly after the suit was filed, Ingersoll Rand informed Mr. McClendon that he was fully vested in his pension benefits and, for the first time, agreed to pay his pension benefits. Accordingly, Respondent seeks no damages for pension benefits, and this suit raises no issues with respect to the administration or regulation of a pension plan. Rather, the suit seeks lost future wages, mental anguish and punitive damages engendered by Petitioner's wrongful termination of Mr. McClendon's employment. Petitioner at no time in its pleadings in the trial court raised any issue involving the Employer Retirement Income Security Act of 1974 ("ERISA") or the possibility of pre-emption.

The trial court granted a motion for summary judgment on grounds which had nothing to do with ERISA, and that ruling was affirmed by the 14th Court of Appeals. Pre-emption and ERISA were not raised at *any* stage by Ingersoll Rand. The appellate court held that Mr. McClendon's employment was an "at-will" employment which did not fall within any of the specific exceptions that prohibited employment termination in Texas. The appellate court also refused to apply the doctrine of good faith and fair dealing to the issue of employment termination.

The Texas Supreme Court granted writ on the issue whether the doctrine of good faith and fair dealing should apply to the employment setting. The Texas Supreme Court's decision, however, did not reach that issue. Instead, the Court created an additional exception to the Texas employment-at-will doctrine and held that a terminated employee can recover damages in Texas if the principal reason for the employment termination was the employer's desire to avoid contributing to, or paying benefits under, the employee's pension fund. Opp. Br. 1a.

The majority opinion by the Texas Supreme Court specifically stated that the wrongful termination cause of action was not pre-empted by ERISA. Each state is entitled to develop its own laws with respect to wrongful employment termination, and the Texas Supreme Court has done so in this case.

SUMMARY OF ARGUMENT

Respondent has conceded that he has received and will receive all of his pension rights and benefits. This is not a case seeking any pension rights or benefits. Rather, this case attempts to determine whether Petitioner's motives and reasons for terminating Respondent's employment

were proper under Texas law. This is not a federal question and has absolutely nothing to do with the Employment Retirement Income Security Act of 1974 ("ERISA"), or the administration or regulation of a pension plan. The Texas Supreme Court simply held that a plaintiff can recover damages for employment termination principally motivated by an attempt to avoid pension obligations.

Prior to this latest exception to the employment-at-will doctrine, the Texas Supreme Court created an exception whereby a plaintiff could recover damages if he or she were fired for refusing to commit a crime. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). Under *Sabine Pilot v. Hauck*, the fact finder must determine whether the employment termination was motivated by such a refusal. The crime can be a violation of a federal, state or local law; the law itself is not the relevant issue. Rather, the issue is whether the employer's decision to terminate was motivated by the refusal to commit the crime. The Texas Supreme Court's newest exception to the "at-will" doctrine is analogous. The specific pension plan, its contents or its administration are not relevant issues. Rather, the issue is whether the employer's decision to terminate was motivated by the employer's attempt to avoid its pension obligations. Consequently, ERISA and Ingersoll Rand's pension plan are irrelevant to this case.

The pre-emption provision of ERISA was included in that Act to standardize the administration and regulation of pension plans so that employers would not be subject to different rules and regulations when they operated across state lines. The intent of this provision was to forestall the administrative nightmares that would otherwise follow and enable these plans to be managed in a

more efficient manner. This Court has stated that permitting a federal law to pre-empt a state law is not favored and will not be done unless Congress has unmistakably ordained such a result to occur. *Florida Lime and Avocado Growers, Inc. v. Pall*, 373 U.S. 132, 142 (1963). The present fact situation is not one to which the ERISA pre-emption provision was intended to apply.

The plain meaning of Section 514(a), ERISA's pre-emption provision, applies only to a state law that "purports to *regulate*, directly or indirectly, *the terms and conditions* of employee benefit plans" covered by ERISA. (emphasis added). The state law formulated by the Texas Supreme Court is totally unrelated to the regulation of the terms and conditions of pension funds. More importantly, the Texas Supreme Court's exception to the employment at-will doctrine has nothing to do with ERISA-covered pension plans. The statutory pre-emption language, therefore, is inapplicable to this case.

In addition, this Court has confirmed that ERISA pre-emption applies only to state laws that deal with the administration or regulation of pension funds. In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987), this Court stated that the focus of ERISA is on the "administrative integrity" of pension plans and that "[ERISA] [p]re-emption ensures that the *administrative practices* of a benefit plan will be governed by only a single set of regulations." (emphasis added). The Texas law before the Court has absolutely nothing to do with the *administrative practices* of any benefit plan. Rather, the Texas law merely prohibits a Texas employer from terminating one's employment for the principal reason of avoiding the payment of benefits under an employee benefit plan. This law does not intrude on ERISA's uniform

administrative scheme for pension plans, and pre-emption does not apply.

In addition to the specific reasons for the denial of pre-emption, the general purpose of ERISA mandates that this case remain a state cause of action. ERISA was originally conceived to safeguard employees from "such abuses as self-dealing imprudent investing, and misappropriation of plan funds." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 15, quoting 120 Cong. Rec. 29932 (1974). It is clear from the facts that this case has nothing to do with the operation or administration of Peti- *Coyne*, 482 U.S. at 15, quoting 120 Cong. Rec. 29932 tioner's pension fund or with the types of laws intended to be covered by the ERISA pre-emption clause. Accordingly, pre-emption is inappropriate.

ARGUMENT

I.

INDIVIDUAL STATES, AND NOT FEDERAL LAW, HAVE TRADITIONALLY REGULATED AND GOVERNED THE LAW REGARDING TERMINATION OF EMPLOYMENT RELATIONSHIPS

It is beyond question that the individual states of the union have traditionally governed employer-employee relatinoships and have sought to formulate laws governing this relationship consistent with the public policy concerns of each state. More specifically, the individual states have traditionally and almost exclusively developed a set of laws and rules detailing the conditions and circumstances under which an employer could terminate a given employ-

ment relationship with a specific employee. For example, the employment at-will doctrine has been a part of Texas law for over 100 years, and this doctrine, until recently, has enabled employers to terminate employees employed on an indefinite basis with or without cause for such termination.[1] *East Line and R.R.R. Co. v. Scott*, 72 Tex. 70, 10 S.W. 99 (1888). Recently, the Texas Supreme Court has carved out specific exceptions to the employment at-will doctrine in *Sabine Pilot Service, Inc. v. Hauck* and in this case.

In addition to Texas, other states have formulated their own rules with respect to an employer's ability to terminate one's employment. For example, the states uniformly recognize that an employer-employee may contractually agree that an employment relationship may not be terminated without good cause. *See, e.g., Fairmont Creamery Co. v. Ewing*, 43 Ohio App. 191, 182 N.E. 883 (1932). In addition, a number of states imply a covenant and/or duty of good faith and fair dealing into all employment contracts.[2] Finally, by way of example, New York, like Texas, provides a state cause of action for New York employees terminated solely because the employer sought to deprive the employee of his or her pension benefits. *See e.g. Savodnic v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D. N.Y. 1980); *Hovey v. Lutheran Medical Center*, 516 F. Supp. 554 (E.D. N.Y. 1981).

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1. Federal and state legislation has been enacted placing certain limits upon an employer's ability to discharge an employee at-will, but such legislation refers to very fact specific situations and does not apply to the current case. See Texas Supreme Court's summary of such laws at Opp. Br. 3a.

2. See, for example, *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (N.H. 1974); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); and *K-Mart Corp. v. Ponsock*, 732 P.2d 1364, 1370 (Nev. 1987).

These examples demonstrate that the individual states have traditionally formulated the rules governing wrongful employment termination based on the public policies of each state.

As stated, the Texas Supreme Court has recently scrutinized the Texas version of the employment at will doctrine and has taken steps to mitigate the harshness of the doctrine in accordance with the modern realities of the employment setting. In *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985), the Texas Supreme Court recognized a cause of action for a plaintiff alleging that his employment termination was motivated by his refusal to perform an illegal act. The Court created an exception to the employment at-will doctrine to render this doctrine more consistent with the state's public policy. In the case before the Court, the Texas Supreme Court created another public policy exception to the "at-will" doctrine and provided a cause of action for employees whose termination is principally motivated by a desire to avoid making contributions to or paying benefits under a pension plan.

A comparison of these two recent exceptions to the Texas employment at will doctrine points out the weakness of Petitioner's pre-emption argument. If an employee is fired for refusing to commit a crime, it is irrelevant if it is a state, federal or local crime. The employer's *motivation*, not the type of crime, is the relevant issue. Similarly, if an employer terminates an employee to avoid making pension contributions and later enables the employee's pension to vest, the regulation or administration of the pension plan is irrelevant. Only the employer's *motivation* is relevant, and the substance or administration of the pension plan is unaffected.

It is axiomatic that each state has the power to formulate and devise laws affecting and governing the employment relationship between the employer and employee, and this power includes the state's ability to enact laws governing employment terminations. Absent the specific federal statutes that largely address certain types of employment discrimination (which do not apply to this case), the sovereign power of each state enables each state to formulate its own laws governing the employment relationship. This is what the Texas Supreme Court has done in its case. Its ruling does not conflict in any way with ERISA and has no effect on any pension plan, and ERISA generally, and its pre-emption provision specifically, therefore do not apply to this case.

II.

BOTH ERISA AND ERISA'S PRE-EMPTION PROVISION DO NOT APPLY TO THE CASE BEFORE THE COURT

As stated, the individual states have traditionally regulated their own laws regarding wrongful employment termination. The Texas Supreme Court employed that function with its ruling in the proceedings below. In its rulings on federal pre-emption of state laws, this Honorable Court has "presume[d] that Congress did not intend to pre-empt areas of traditional state regulations." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). *See also Massachusetts v. Morash*, 109 S.Ct. 1668, 1675 (1989). Accordingly, the new Texas law, which embodies a part of traditional state regulation, should not be pre-empted by ERISA.

In addition to this general presumption, Section 514 (c)(2) confirms that ERISA's specific pre-emption

clause is inapplicable to this case. ERISA pre-emption applies only to any governmental entity that "purports to *regulate*, directly or indirectly, *the terms and conditions of employee benefit plans covered by this subchapter*." (emphasis added). The Texas law set forth in the decision below has absolutely no affect or impact on the regulation of the terms and conditions of Petitioner's benefit plans. Rather, it deals solely with Petitioner's motivation for terminating Respondent's employment. Therefore, the decision below "regulates" a Texas employer's conduct and in no way "regulates" or attempts to regulate the terms or conditions of a pension plan. Accordingly, pre-emption is inappropriate.

Definitive evidence that this case does not involve the "regulation" of the "terms and conditions" of ERISA pension plans is found by Petitioner's total failure to plead pre-emption, ERISA or any specific terms and conditions of its pension plan. Indeed, there is no trial court pleading on which to conclude that Petitioner's pension plan qualifies as an ERISA plan. In addition to the fact that a failure to plead pre-emption is a waiver of that defense (see discussion *infra* at Section V), the absence of details regarding Petitioner's pension plan confirms the fact that the terms and conditions of Petitioner's plan are irrelevant to Petitioner's motivation for the termination of Mr. McClendon's employment.

Petitioner's argument for ERISA pre-emption rests precariously upon the presumptuous, but incorrect, assumption that the Texas Supreme Court's holding implicates or touches the general regulatory and administrative concerns for which ERISA was enacted. Congress expressly defineated its findings and declaration of policy with respect to ERISA and pension plans and stated:

> that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation and administration of (pension) plans . . .

29 U.S.C. § 1001(a). This case does not deal with the establishment, operation or administration of pension plans.

In addition, this Court has specifically held that ERISA's pre-emption provision does not relate to "employee benefits" but only to state laws governing "employee benefit *plans*" (emphasis added). *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 11-12. In *Fort Halifax Packing Co. v. Coyne*, this Court held that a Maine plant closure statute requiring employers to provide a one-time severance payment to employees was not pre-empted by ERISA and stated:

> ERISA pre-emption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 522. The argument that ERISA pre-empts state laws relating to certain employee benefits, rather than to employee benefit *plans*, is refuted by the express language of the statute, the purposes of the pre-emption provision, and the regulatory focus of ERISA as a whole. *If a State creates no prospect of conflict with a federal statute, there is no warrant for disabling it from attempting to address uniquely local social and economic problems. Since the Maine severance payment statute raises no*

> *danger of such conflict, we hold that the statute is not pre-empted by ERISA.* (emphasis added).

Fort Halifax Packing Co. v. Coyne, 482 U.S. at 19.

Just as the State of Maine in *Fort Halifax Packing Co. v. Coyne*, the State of Texas in the case below has taken steps to protect its workers in accordance with the State's public policy. This protection, which takes the form of a cause of action for wrongful employment termination, does not relate in any way to the regulation of pension or benefit *plans*, and does not create a prospective conflict with ERISA. Just as in *Fort Halifax Packing Co. v. Coyne*, therefore, this Honorable Court should hold that the Texas law set forth in the case below is not pre-empted by ERISA.

The *Fort Halifax Packing Co. v. Coyne* Court also noted that ERISA was enacted because Congress desired to safeguard employees from "such abuses as self--dealing, imprudent investing and misappropriation of plan funds." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 15, quoting 120 Cong. Rec. 29932 (1974). These are all factors that protect employees. The Texas Supreme Court's holding is totally consistent with this motivation. The Texas Supreme Court's holding below creating an exception to the at-will doctrine has absolutely no relationship to the types of abuses from which ERISA was designed to protect employees. The holding in no way alters the law with respect to the commingling of funds, self-dealing, or any other abuse that would clearly be for ERISA to govern. Rather, this opinion simply represents one state's decision to change its employment law to include a much needed protection for Texas workers. The opinion has absoluely no effect on the regulation or administration of any pension funds.

In *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), this Court addressed whether ERISA permits state tax authorities to collect unpaid state income taxes by levying upon taxpayer funds kept in an ERISA-covered benefit plan. This Court held that a state's right to enforce its tax levies is not of central concern to the ERISA statute. That is, even though the California statute would subject certain funds held in an ERISA plan to a state levy, this Court held that a state's right to enforce its tax levies is not something about which ERISA is concerned. This holding clearly impacts upon an ERISA plan with far more force than does the holding by the Texas Supreme Court in this case. The *Franchise Tax Board v. Construction Laborers Vacation Trust* holding enables states, under the proper circumstances, to remove certain funds from a pension plan that would otherwise be available to plan participants. The Texas Supreme Court's holding, on the other hand, has no effect on any pension plan and would require the employer, not the pension fund, to compensate the plaintiff. Moreover, a state's right to formulate its own laws with respect to employment termination is, like a state's right to enforce its tax levies, not something with which ERISA is concerned.

III.

PETITIONER HAS NOT MET AND CANNOT MEET ANY OF THE PRE-EMPTION TESTS ARTICULATED BY THIS COURT

In *English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990), this Court identified the conditions necessary for federal legislation to pre-empt a state law: (1) Con-

gress explicitly defines the extent to which its enactment pre-empts state law; (2) absent explicit statutory language, state law is pre-empted when it regulates conduct in a field that Congress intended the federal government to occupy exclusively; and (3) state law is pre-empted to the extent that it actually conflicts with federal law. As will be demonstrated herein, none of these conditions is present in this case, and pre-emption is improper.

A. ERISA's Pre-emption Provision Specifically Excludes The State Law Before This Court

Section 514(a) of ERISA (codified at 29 U.S.C. § 1144 (a)) states that the ERISA provisions shall "supersede any and all state laws insofar as they may now or hereafter relate to any (covered) employee benefit plan," and § 1144(c) defines the term "state" to include a state or political subdivision or agency that "purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." This Court has long recognized that Congress usually expresses the purpose of its legislation by the ordinary meaning of the words chosen by Congress, and a federal statute must be strictly construed to give effect to the plain meaning of the language employed by Congress. *U.S. v. Locke*, 471 U.S. 84, 95 (1985). The plain meaning of this statute mandates pre-emption only if the state law in question purports to regulate the terms and conditions of employee benefit plans covered by ERISA.

Initially, the law outlined by the Texas Supreme Court makes absolutely no mention of ERISA or plans governed by ERISA. The Texas law merely states that an employee

has a state cause of action if the principal reason for termination was the employer's desire to avoid paying benefits under an employee benefit plan. Petitioner does not and cannot show that the Texas Supreme Court's ruling constitutes a direct or indirect regulation of the terms and conditions of ERISA-covered employee benefit plans. The terms and conditions of a specific plan, as well as whether a specific plan is even covered by ERISA, are totally irrevelant to the Texas law. The only relevant inquiry is the employer's motivation for the termination. Accordingly, application of the "plain meaning" analysis shows that the statutory words employed by Congress expressly exclude this Texas state law from pre-emption.

The decisions of this Court confirm that state laws "relate to" ERISA-covered plans, and are subject to ERISA pre-emption (absent the state law falling into a specific ERISA exception) only when the state law purports to *regulate* the terms and conditions of ERISA benefit plans. For example, in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), this Court held that a New Jersey statute designed to prevent a procedure known as "integration" related to and was pre-empted by ERISA. The New Jersey statute regulated ERISA plans because it specifically eliminated one method for calculating pension benefits that was otherwise available and permissible under ERISA. In *Shaw v. Delta Air Lines, Inc.*, 453 U.S. 85 (1983), this Court held that state legislation mandating the payment of specific employee benefits and dictating the structure of benefit plans was pre-empted. That legislation specifically attempted to regulate the structure of benefit plans in a way that would preclude employers from discriminating against pregnant women. Similarly, in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the Court held that a state statute requiring ERISA plans to provide minimum mental health care benefits was pre-empted wherein the state attempted to regulate the minimum benefits of ERISA plans. In addition, this Court has twice held that a state law tort or contract claim brought by a beneficiary asserting improper processing or denial of benefit claims under ERISA plans related to ERISA plans and were pre-empted by ERISA. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). Both of these cases related directly to the processing or denial of ERISA claims. Finally, this Court has held that ERISA pre-emption applies when state laws expressly refer to and apply solely to ERISA benefit plans. *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825, 829 (1988). These cases confirm that ERISA pre-empts only state laws, that, unlike the law at issue in this case, attempts to regulate the terms and conditions of ERISA plans.

Conversely, when, as here, the state law does not attempt to regulate the terms and conditions of ERISA plans, this Court has held that ERISA pre-emption does not apply. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 22-23; *Mackey v. Lanier Collection Agency*, 486 U.S. at 833, 834.

Other federal Courts have confirmed that ERISA pre-emption does not apply to the type of case before the Court. In *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142, 146 (2nd Cir. 1989), the Court stated that ERISA only pre-empts state laws that (1) provide an alternate cause of action to employees to collect benefits under ERISA; (2) refer specifically to ERISA plans and apply solely to them; or (3) interfere with the calculation of benefits

owed to an employee. It is obvious that none of these situations is applicable to the present case.

In *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985), a terminated employee sought to recover, among other things, lost accumulated and prospective pension benefits. Although accumulated benefits were pre-empted by ERISA, the Court held that the employee's state claim for the loss of prospective benefits was not pre-empted by ERISA. The Court noted that the claim raised no issue concerning matters pertaining to the regulation and administration of the pension plan and stated that the basic issue involved in this claim is no different from the issue that would be involved in a claim alleging that the employer conspired to force the employee to accept lower wages. *Scott v. Gulf Oil Corp.*, 754 F.2d at 1505. The Ninth Circuit has clearly held, therefore, that claims for lost prospective benefits are not pre-empted by ERISA unless they involve the regulation or administration of a pension plan. Based on this analysis, pre-emption does not apply to the case before the Court.

The Fourth Circuit adopted a similar analysis in *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir. 1989). This case involved a wrongful termination action alleging, among other things, breach of an employment contract. The employment termination impacted upon the pension benefits available to the employee, and the state law cause of action sought to recover lost prospective benefits as a component of damages. The Court held that the state law causes of action relating to loss of prospective pension benefits were not pre-empted by ERISA. The Court based this holding on the analysis that the claims would not (1) submit the employer to conflicting employer obligations and variable standards of recovery; (2) determine whether any benefits

are paid; (3) affect the administration of benefits under the plan; or (4) be paid by the plan fiduciary with plan funds. *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d at 120.

In *Schlenz v. United Airlines, Inc.*, 678 F. Supp. 230 (N.D. Cal. 1988), a case similar to the present case, a terminated employee brought a state law cause of action against the employer alleging that the employer terminated the employment because the employee (1) was about to vest in a pension plan; (2) was a higher paid employee because of seniority; and (3) was soon to be recalled to a higher paying position with the company. The basis of plaintiff's suit was that the plaintiff sought to recover damages for the lost opportunity to earn future benefits, including pension plan benefits, as a result of the employer's wrongful conduct. The Court held that the state law wrongful termination cause of action was not pre-empted by ERISA because it was unrelated to an employee benefit plan and touched, at best, only peripherally on ERISA.

The present case is more remote from an ERISA claim than the above cited cases. In this case, the Respondent seeks absolutely no pension benefits, past or future. Respondent has received his pension benefits. What he did not receive was continued employment; and the evidence shows that he was fired because the Petitioner wanted to avoid its pension obligation. The Texas Supreme Court has correctly held that the cause of action created by Petitioner's egregious conduct is a state cause of action that is not pre-empted by ERISA.

The Texas Supreme Court correctly held that such employer conduct is against sound public policy. The Court recognized that the employment-at-will doctrine

should not be used by an employer as a sword to exploit unfortunate employees and a shield to excuse the avoidance of pension plan obligations. Accordingly, the Supreme Court held that an employment termination engendered by an attempt to avoid pension obligations is actionable in the State of Texas. This holding has absolutely no effect on the regulation or administration of pension plans. Accordingly, Petitioner's requests for pre-emption should in all things be denied.

B. Congress, Through ERISA, Did Not Pre-empt The "Field" With Respect To All State Laws That Involve Pension Plans

As stated, this case involves a State's wrongful employment termination law and ERISA is inapplicable. It should be noted, however, that this Court has made it clear that Congress did not intend to pre-empt the "field" with respect to pension plans, and the second test set forth in *English v. General Electric Co.*, cannot be met. *See, e.g., Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987).

This Court has stated that Congressional intent to supersede or pre-empt a state law must be "clear and manifest" if the area for which pre-emption is argued has traditionally been an area occupied or regulated by the states. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946). As discussed in Section I, *supra*, regulation of the employment relationship has traditionally and historically been a function of state governments. As such, ERISA could not be held to pre-empt the Texas Supreme Court's holding unless Congress had a "clear and manifest" intent to pre-empt this particular state law setting forth an impermissible reason for an employment termination. This

is an area traditionally left to the regulation of the individual states, and there was no intent by Congress to pre-empt the law of employment termination.

In *Fort Halifax Packing Co. v. Coyne*, the Court stated:

> It is thus clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patch-work scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. *Pre-emption assures that the administrative practices of a benefit plan will be governed by only a single set of regulations.*

Fort Halifax Packing Co. v. Coyne, 482 U.S. at 11. (emphasis added). As stated, this case does not involve the administrative practices of a benefit plan and pre-emption does not apply.

Petitioner seems to indicate that the mere mention of "pension plan" in connection with employment termination mandates ERISA pre-emption. Where, as here, a state law's relation to a benefit plan is at best "tenuous, remote or peripheral", ERISA pre-emption does not apply. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 100. In addition, the *Shaw v. Delta Air Lines, Inc.* Court cited with approval *American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118, 121 (2nd Cir. 1979), which held that ERISA did not pre-empt a state law that permitted garnishment of pension benefits in order to enforce alimony and child support orders. The Court held that despite the law's

direct effect on ERISA pension plans, the effect was remote and peripheral and, therefore, pre-emption was inappropriate. *Shaw v. Delta Air Lines, Inc.*, and the cases cited therein demonstrate that Congress did not attempt to pre-empt the entire "field" regarding pension plans.

As stated in *Fort Halifax Packing Co. v. Coyne*, Congress intended ERISA's pre-emption provisions to afford employers the advantages derived as a result of a uniform set of administrative procedures governed by one set of regulations. State laws, such as the one at issue, which do not deal directly with the administration of ERISA plans, are not pre-empted.

C. The Texas Supreme Court's Decision Creates Absolutely No Conflict With ERISA

Since the Texas Supreme Court's decision does not conflict with ERISA, pre-emption is also impermissible under the third test set forth in *English v. General Electric Co.*, 110 S.Ct. at 2275. There is no conflict between the Texas Supreme Court's holding enabling a terminated employee to bring a wrongful termination cause of action against an employer and the ERISA legislation designed to protect and preserve the integrity of pension plans. The Texas Supreme Court's opinion highlighted this fact:

> Two federal district court cases have held that a claim for wrongful discharge in order to avoid the payment of pension funds is preempted by ERISA. *Pratt v. Delta Air Lines, Inc.*, 675 F. Supp. 991 (D. Md. 1987); *Cahall v. Westinghouse Electric Corp.*, 644 F. Supp. 806 (E.D. Pa. 1986). These cases, however, can be distinguished from the present action because here the plaintiff acknowledges in his brief to the Court of Appeals that he is not seeking lost pension benefits but is instead seeking lost future wages, mental anguish and punitive damages as a result of the wrongful discharge.

Respondent's cause of action in the Texas State Courts will address specifically the Petitioner's motivation for Respondent's employment termination and would implicate no ERISA concerns in any respect. It follows, therefore, that such a cause of action does not conflict with ERISA and is not pre-empted by ERISA.

If Respondent successfully proves that Petitioner terminated his employment in order to avoid making contributions to Respondent's pension fund, Petitioner, not the pension plan, will be liable for all damages recovered by Respondent. In *Greenblatt v. Budd Co.*, 666 F. Supp. 735 (E.D. Pa. 1987), the court held that ERISA pre-emption does not apply where, as here, the employer, and not the plan, would pay the damages. Respondent seeks no benefits from Petitioner's pension plan: Respondent's lawsuit does not and will not impact upon the administration of such plan's benefits in any way; and no damage payment would be made by the plan fidicuiary with plan funds. Accordingly, the newly-created Texas cause of action does not conflict with ERISA and is, therefore, not pre-empted by ERISA.

IV.

THE TEXAS LAW MAKES NO ATTEMPTS TO REGULATE ERISA PENSION PLANS

The Texas law at issue makes no attempt to regulate ERISA pension plans or any other types of pension plans. This Court has stated that the focus of ERISA is on the

"administrative integrity" of benefit plans. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 15. The purpose of ERISA was to provide a set of standard procedures to guide the administration of pension plans. This Court has articulated the types of the potential problems that required the uniform rules of ERISA:

> A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others. . . . [The court continued that] [p]reemption ensures that the *administrative practices* of a benefit plan will be governed by only a simple set of regulations. (emphasis added.) *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 9-11.

The Texas Supreme Court's decision does not affect in any way the regulation or administrative practices of pension plans. Absolutely nothing regarding the terms, conditions or administration of Texas pension plans are affected by the new law. In accordance with *Fort Halifax Packing Co. v. Coyne*, the *administrative practices* of pension plans will still be governed by ERISA's single set of regulations. Since the purpose of the pre-emption provision is not affected by this law, pre-emption is improper.

Petitioner's brief alleges, for the first time and with no support in the record, that "unbeknownst to respondent . . . he was fully vested under the pension plan at the time of his termination."[3] Pet. Br. 20, n. 4. Petitioner uses

3. The record shows that Petitioner fired Mr. McClendon and denied his pension benefits. It was not until Mr. McClendon suffered hardship and filed a lawsuit hat Petitioner agreed to pay Mr.

this allegation to argue that the plan's complex vesting provisions would be the focus of Petitioner's defense in the trial Court in an effort to show that Respondent had already vested before he was terminated.

Petitioner's assertions, although not supported by the record, illustrate the inapplicability of ERISA and mandate the conclusion that ERISA pre-emption does not apply to the Texas law. Regardless of the complexity of the vesting provision or Petitioner's after the fact assertion that the pension vested before termination, the central issue under the Texas law is whether Petitioner, at the time of termination, fired Mr. McClendon to avoid pension benefits. If Petitioner terminated Mr. McClendon's employment for the principal reason of avoiding pension obligations, Petitioner is liable under Texas law regardless of the terms and conditions of Petitioner's plan. Even if the plan shows or Petitioner asserts that Mr. McClendon's pension vested before he was fired, he would still recover if Petitioner, at the time Mr. McClendon was fired, terminated Mr. McClendon's employment to avoid its pension obligations. Mr. McClendon does not seek pension benefits and does not raise any questions regarding vesting or Petitioner's plan. Rather, Mr. McClendon seeks what he lost because of his wrongful termination. Petitioner's own example, therefore, highlights the fact that the Texas law concentrates on the employer's motivation for firing an employee and does not attempt to regulate ERISA pension plans in any way.

McClendon's pension benefits. The relevant issue under the Texas law deals with Petitioner's motivation for the firing at the time of firing. If Petitioner did not understand the terms of its own plan and fired Mr. McClendon for the principal purpose of avoiding pension obligations, Mr. McClendon has a cause of action against Petitioner, and the cause of action is totally unrelated to ERISA.

V.

ALTHOUGH ERISA GENERALLY AND ITS PRE-EMPTION PROVISION SPECIFICALLY DO NOT APPLY TO THIS CASE, PETITIONER HAS WAIVED ANY RIGHT TO ASSERT ERISA AS A DEFENSE TO RESPONDENT'S TEXAS CAUSES OF ACTION

The record shows that Petitioner failed to assert ERISA and/or ERISA pre-emption as an affirmative defense in the trial court. Both Federal Rule of Civil Procedure 8(c) and Texas Rule of Civil Procedure 94 provide in pertinent part that a party shall set forth in a responsive pleading "any other matter constituting an avoidance or affirmative defense." An affirmative defense has been defined as a defense that raises matters extraneous to a Plaintiff's prima facie case. *Ford Motor Co. v. Transport Indemnity Co.*, 795 F.2d 538, 546 (6th Cir. 1986). It is well established that a litigant's failure to assert an affirmative defense in a responsive pleading results in a waiver of that defense. *Menendez v. Perishable Distributors, Inc.*, 763 F.2d 1374, 1379 (11th Cir. 1985). Further, Petitioner's claim of ERISA pre-emption is *a defense* to Respondent's cause of action. *Allstate Insurance Co. v. The 65 Security Plan*, 879 F.2d 90, 93 (3rd Cir. 1989), and such a defense clearly constitutes an affirmative defense pursuant to *Ford Motor Co. v. Transport Indemnity Co.* It is obvious from reading Petitioner's Original Answer (J. A. 8) that Petitioner failed to raise ERISA pre-emption as a defense, and such failure to raise this affirmative defense in any responsive pleading constitutes a waiver of the pre-emption defense. Accordingly, Petitioner cannot employ ERISA or ERISA pre-emption as a defense to Respondent's state law cause of action in this case.

VI.

CONCLUSION

The judgment of the Court below should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY MCCLENDON,
Respondent.

On Writ of Certiorari to the Supreme Court of Texas

REPLY BRIEF FOR THE PETITIONER

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1. Respondent and his amici first argue (Resp. Br. 11-14; Nat'l Gov. Assoc. *et al.* Br. 8-9; NELI/ACLU Br. 3-4) that protection of employees against wrongful interference with their rights under pension plans is a traditional area of state regulation which is of no concern to ERISA. That simply is not true. Respondent and his amici cite no authority for their proposition except the decision below, another very recent state court decision, and two decisions of a single federal district court that was interpreting the law of New York some six years after ERISA was passed.[1] The paucity and recent vin-

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[1] *See K Mart Corp. v. Ponsock*, 732 P.2d 1364 (Nev. 1987); *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D.N.Y. 1980); *Hovey v. Lutheran Medical Center*, 516 F. Supp. 554 (E.D.N.Y. 1981). Though the U.S. District Court for the Eastern District

tage of those decisions would itself seem to refute the claim of tradition. In any event, a pre-ERISA survey reveals that such a state-law based claim was rejected in the only case in which it was presented. *See* Annotation, *Rights and Liabilities as Between Employer and Employee With Respect to General Pension or Retirement Plan*, 42 A.L.R.2d 461, 479 (1955).

The reason why there is no tradition of state regulation of wrongful interference with rights under pension plans is precisely the reason why such regulation relates to pension plans. There is little danger of wrongful interference with employees' rights under plans when such rights are minimal (as, for example, when there is no vesting). It is only when minimum standards are established for plans (such as vesting) that the danger arises that employers will attempt to evade those standards through wrongful discharge or other wrongful interference. The states have had no reason to prohibit wrongful interference with rights under pension plans because traditionally they have not established minimum standards for pension plans.[2]

It was only when Congress established minimum standards for plans in ERISA that it became necessary to establish an enforcement mechanism to assure enjoyment of those rights free from wrongful interference. Thus, while ERISA does not purport to regulate the entire

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of New York "firmly believe[d]" (*Savodnik*, 488 F. Supp. at 825) that the courts of New York would recognize a state-law cause of action for discharge to interfere with the attainment of a pension, it cited no New York case so holding, nor has respondent cited any New York case so holding, either before or after *Savodnik*.

[2] As this Court noted in *Malone v. White Motor Corp.*, 435 U.S. 497, 507, 510-511 (1978), the legislative history of the federal Welfare and Pension Plans Disclosure Act of 1958 disclosed little state regulation of pension plans up to that point. Indeed, there was little state regulation of pension plans until a handful of states acted just prior to ERISA, as exemplified by the Minnesota law at issue in *Malone*, which was passed in April 1974.

employment relationship, it is *vitally* concerned with the one portion of it that plainly relates to plans—where the employer acts for the purpose of interfering with the attainment of benefits under a plan. The employer's purpose to interfere with the employee's rights under a plan is the direct connection with the plan and the factor that marks off this area of the employment relationship.[3]

The field of employee benefit plans therefore includes this portion of the employment relationship, and the effort of respondent and his amici to draw a line between the plan and the employment relationship (preserving the latter for state regulation) must fail. Discharge to interfere with attainment of benefits under a pension plan is the very spot where the plan and the employment relationship overlap.[4] When an employer "makes a commitment systematically to pay certain benefits" through a plan, the obligation to refrain from discharging or otherwise discriminating against an employee for the purpose of interfering with the attainment of those benefits under the plan is just another of the "host of obligations" undertaken in connection with the plan. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987).

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[3] ERISA pre-emption in this area is completely consistent with the cases cited in the briefs of respondent and his amici (Resp. Br. 21-23, 26-27; Nat'l Gov. Assoc. *et al.* Br. 23; NELI/ACLU Br. 11). Those cases concerned laws addressing other areas of the employment relationship, *i.e.*, where the state laws were not concerned with the employer's conduct because it had a connection with or reference to an employee benefit plan, but rather because it was wrongful for reasons entirely unrelated to any plan.

[4] As explained in detail in our opening brief (at 26-36), the legislative history leaves no doubt that Congress understood protection against wrongful interference with rights under plans to be part of the field of employee benefit plans that it was pre-empting for exclusive federal regulation. *See, e.g.*, 120 Cong. Rec. 29935 (1974), *reprinted in* 3 *Legislative History of the Employee Retirement Income Security Act of 1974* ("*Legislative History*") (Comm. Print 1976), at 4751 (remarks of Sen. Javits) (protection against

That Congress has pre-empted state laws which attempt to redefine or complement this obligation is clear from the text of Section 514. Section 514(b) specifically excepts from ERISA pre-emption state laws concerning such traditional areas of state regulation as insurance, banking, and securities, as well as criminal laws of general application. *See* 29 U.S.C. § 1144(b). It contains no exception, however, for state employment laws. Congress did *not* intend to leave it to the states to decide how to prevent employers from evading the minimum standards of ERISA. That is a task that Congress carried out effectively in Section 510 of ERISA and precluded the states from undertaking in Section 514(a).[5]

2. Respondent and his amici err in contending next (Resp. Br. 11-48; Nat'l Gov. Assoc. *et al.* Br. 10-14; NELI/ACLU Br. 5-9) that Section 514(c)(2) of ERISA limits the class of state laws that may "relate to" a plan and that the Texas common law at issue here is not within that class. Actually, Section 514(c)(2) is not a limitation but an extension of the term "State".

Section 514(c)(2) is not, as respondent and his amici suggest, the definition of the term "State" in ERISA.

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wrongful interference with rights under plan is one of the "14 basic rights" guaranteed by ERISA, along with participation, vesting, accrual, and so forth).

[5] As noted in our opening brief (at 44-45), with the exception of the court below, the federal and state appellate courts that have addressed ERISA pre-emption of state laws regulating employer conduct that is directly connected to the plan, by reason of the employer's purpose to interfere with attainment of benefits under the plan, have uniformly agreed that such state laws are pre-empted. To this unanimous opinion of the federal and state appellate courts has now been added the United States Department of Labor, the agency charged with regulating (29 U.S.C. § 1135), investigating (29 U.S.C. § 1134), and enforcing (29 U.S.C. § 1132 (a)(5), (h)) Title I of ERISA. *See* United States Br. 9-21.

"State" is defined in Section 3(10) of ERISA as "any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone." 29 U.S.C. § 1002 (10). Section 514(c)(2) adds to this definition of "State" by providing that, solely for the purpose of Section 514, the term "State" "*includes* a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. § 1144(c)(2) (emphasis added). Rather than contracting the scope of the phrase "relate[s] to," Section 514(c)(2) plainly *extends* the term "State" to reach any instrumentality of a state *if* that instrumentality is attempting to regulate the terms and conditions of employee benefit plans.

The legislative history reveals that Congress intended to extend the term "State" so that "State professional associations acting under the guise of State-enforced professional regulation, should not be able to prevent unions and employers from maintaining the types of employee benefit programs which Congress has authorized—for example, prepaid legal services programs—whether closed or open panel. . . ." 120 Cong. Rec. 29933 (1974), *reprinted in* 3 *Legislative History*, at 4746 (remarks of Sen. Williams). But Congress understood that simply adding instrumentalities to the definition of "State" would have gone too far, because the phrase "relate to" could then reach the ethical rules of state bar associations or prevent them from disciplining members with regard to their service to pre-paid legal service plans. *See* 120 Cong. Rec. 29949 (1974), *reprinted in* 3 *Legislative History*, at 4789 (colloquy between Sens. Taft and Javits). Therefore, Congress limited this *extension* of the term "State" to activity purporting to regulate the terms and conditions of plans, which only confirms Con-

gress's understanding that, the phrase "relate to" encompasses far *more* than regulation of the terms and conditions of plans.[6]

In all events, respondent's interpretation of Section 514(c)(2) cannot be reconciled with the plain language of Section 514(a). Any law that purports to regulate the terms and conditions of an employee benefit plan necessarily "relate[s] to" that plan. It would have been nonsensical to provide that such laws are pre-empted only "insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Moreover, interpreting Section 514(a), this Court has repeatedly stated that the test of pre-emption is whether the state law "has a connection with or reference to" an ERISA-covered plan, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983), and has held state laws pre-empted that did not even arguably regulate the terms and conditions of a plan. *See, e.g., Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829 (1988) (state law that *exempts* plan from state regulation "relate[s] to" plan and is pre-empted). Respondent's interpretation cannot be squared with the Court's understanding of Section 514(a)'s language.[7]

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[6] This explains the remarks of Rep. Dent quoted by amici National Governors' Association *et al.* (Nat'l Gov. Assoc. *et al.* Br. 19). Rep. Dent was referring to how ERISA pre-emption cleared away the obstacles thrown up by state professional societies in the same way as the HMO Act of 1973 pre-empted rules of state professional societies that hindered formation of HMO's. The narrow, specific pre-emption of listed state laws in the HMO Act (42 U.S.C. § 300e-10) cannot properly be compared to the sweeping pre-emption of ERISA.

[7] In addition to *Mackey*, respondent's position conflicts with decisions of this Court in three other cases where the state law regulated the administration or operation of the plan, specifically, the manner of processing claims, rather than its terms and conditions. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

In order to maintain his position in light of this Court's prior decisions, respondent would have to depart from the plain meaning of the word "conditions" in Section 514(c)(2). While "conditions" plainly refers to the conditions of eligibility for benefits under the plan, respondent instead would have to read it to mean the surrounding conditions within which the plan operates (a reading that would also be inconsistent with the legislative history cited above). But that understanding of the term "conditions" applies to the Texas law at issue here as well: the Texas law regulates the conditions within which plans operate just as surely as the cited decisions—by regulating one side of the triangular relationship among the employer, the employee, and the plan.[8]

3. Respondent and his amici also fail in their attempt (Resp. Br. 24-27; Nat'l Gov. Assoc. *et al.* Br. 15-18, 24-27; NELI/ACLU Br. 13-14) to come to grips with the

Recognizing this deficiency in respondent's argument, amici National Governors' Association *et al.* (Nat'l Gov. Assoc. *et al.* Br. 10-14) propose a different new test for pre-emption—whether the state law regulates either the terms and conditions or the administration and operation of a plan. That test cannot be derived from any language in the statute, least of all from respondent's and amici's argument regarding Section 514(c)(2), which, according to respondent and his amici, limits pre-emption to state laws regulating the terms and conditions of plans.

[8] Congress understood that effective regulation of the field of employee benefit plans requires regulation of all three sides of the triangle and accomplished such regulation in ERISA: employee versus plan (*e.g.*, vesting requirements), employer versus plan (*e.g.*, funding requirements), and employer versus employee (*e.g.*, protection against wrongful interference with rights under plan). Respondent and his amici admit that state laws regulating the first two sides of the triangle relate to employee benefit plans and are pre-empted (Resp. Br. 20-21; Nat'l Gov. Assoc. *et al.* Br. 14, n.6); they cannot explain why Congress would have failed to provide pre-emption of state laws regulating the third side.

structure and legislative history of ERISA. They have no response to the obvious conclusion that Section 510 of ERISA demonstrates the understanding of Congress that non-interference laws "relate to" plans (and, indeed, are vital to the effective regulation of plans).

Faced with the fact that the Texas law treats a subject that is treated by ERISA, respondent and his amici are forced to argue that Congress intended to allow the states to treat *some* of the subjects treated by ERISA. They base this argument on the fact that Congress rejected a pre-emption provision that was limited to state laws treating the same subjects as ERISA. As explained in detail in our opening brief (at 26-36) and in this Court's opinion in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 98, however, from the beginning of its consideration of ERISA, Congress was unwavering in its intention to pre-empt state laws treating the same subjects as ERISA. When, in conference committee, Congress replaced the "same subject" formulation with the "relate to" formulation, it did so only to broaden, not to contract, the scope of ERISA pre-emption.

As for this Court's conclusion (*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)) that ERISA's comprehensive civil enforcement mechanism is exclusive, respondent and his amici argue that the exclusive force of ERISA Section 502 is limited to claims for benefits under Section 502(a)(1)(B). However, since violations of Section 510 are remedied by an action under Section 502(a)(3), their position would require the Court to hold that one subparagraph of Section 502(a) provides exclusive remedies and one does not—a distinction that would be out of step with the Court's previous holding that "[t]he deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." *Id.*

Nor does this Court's recent decision in *English v. General Electric Co.*, 110 S. Ct. 2270 (1990), offer respondent any comfort. In *English*, the Court's analysis was not guided by "explicit statutory language" (*id.* at 2275) commanding pre-emption; the Court specifically distinguished ERISA as an example of a federal statute that *does* explicitly define the extent of pre-emption (*ibid.*). The Court in *English* found the argument for pre-emption unpersuasive because it would have resulted in pre-emption of state criminal laws of general application; ERISA contains an express exception preserving state criminal laws of general application (29 U.S.C. § 1144(b)(4)). The state law in that case had a different purpose from the federal law; here, the state law not only has the same purpose as the federal law (protecting employees' interests in pension plans), but is designed to enforce exclusively federal standards for plans. This Court had previously found that the federal scheme at issue in *English* was to be supplemented by state tort remedies; the Court has previously found that ERISA does *not* permit state tort remedies (*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987)). The whistleblower remedy at issue in *English* was created 24 years after Congress occupied the field in the Atomic Energy Act; Sections 502, 510 and 514 of ERISA were developed and enacted together as a carefully integrated and exclusive scheme. And, in *English*, the Court expressly distinguished the comprehensive pre-emptive force of the National Labor Relations Act; ERISA pre-emption is modeled on that Act (*Pilot Life*, 481 U.S. at 54-56).[9]

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[9] It should also be noted that *English* was not a wrongful discharge case; the wrongful discharge claim was rejected by the district court and not appealed (110 S. Ct. at 2274 n.4). In this Court, English claimed only that the employer's conduct prior to the discharge was outrageous and remediable under the state tort law (*id.* at 2274-2275). Thus, unlike this case, the employer's conduct was actionable under state law for an entirely different reason from why it might have been actionable under federal law.

4. As for the policy of ERISA, respondent and his amici err (Resp. Br. 24-29; Nat'l Gov. Assoc. *et al.* Br. 18-24; NELI/ACLU Br. 12-13) in citing the *Fort Halifax* case for the proposition that the purposes of ERISA (and ERISA pre-emption) are limited to promoting uniformity in the administrative practices of plans. In *Fort Halifax*, this Court focused on the question of administrative practices, not to determine whether the state law "relate[d] to" a plan, but whether there was a "plan" to which the state law related. The Court held that a "plan" does not exist in the absence of administrative machinery; thus, the Maine law in that case did not relate to a "plan" because it did not affect any on-going administrative machinery or call such an administrative machine into being. 482 U.S. at 12-13. The Court did *not* hold that where, as in this case, there is indisputably an ERISA-covered plan, a state law "relate[s] to" the plan only if it affects the administrative practices of the plan.

Respondent's argument ultimately overlooks the fact that the most fundamental purpose of ERISA, from which all of its provisions spring, is to "promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 90. ERISA promotes the interests of employees in their plans in a variety of ways, of which regulation of the administrative practices of plans is just one. No less important than any other way is assuring that employees enjoy their rights under their plans free from wrongful interference by the employer.[10] In attempting to do the same, the Texas law directly implicates the purposes of ERISA.

[10] Other ways include: assuring that all plans meet minimum standards for participation, vesting, accrual, etc. (Part 2 of Title I of ERISA); assuring that employers make adequate contributions to plans (Part 3 of Title I); assuring that the assets of plans are properly invested (Part 4 of Title I); and guaranteeing benefits when plans terminate with insufficient assets (Title IV).

Indeed, the Texas law threatens to defeat the purposes of ERISA. When considering ERISA, Congress understood that rules which appear on their face to promote the interests of employees could, if too severe, ironically work against the purpose of promoting employees' interests in their plans by discouraging employers from establishing or continuing plans. *See, e.g.*, S. Rep. No. 383, 93d Cong., 1st Sess. 19 (1973), *reprinted in* 1 *Legislative History*, at 1063, 1087; 120 Cong. Rec. 29209 (1974), *reprinted in* 3 *Legislative History*, at 4703-4704 (remarks of Rep. Collier); 120 Cong. Rec. 29951 (1974), *reprinted in* 3 *Legislative History*, at 4797 (remarks of Sen. Bentsen); *see also Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 96-100, 104-106; *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 10. State-law based causes of action for wrongful interference with the attainment of rights under a plan—imposing potentially different substantive standards of conduct, with different procedural and proof requirements, as well as possible jury trials and punitive damages—are just such types of state laws. They would upset the balance that Congress struck and work against the congressional purpose of promoting employees' interests in plans.

To appreciate the threat, one need only look to an area where Congress did *not* pre-empt state laws—state regulation of the content of insurance policies purchased by insured health plans. In this area, state regulation has had a dramatic effect on employee benefit plans—a massive nationwide shift from insured plans to self-insured plans (or, in some instances, to abandonment of plans) in order to avoid varying state insurance laws.[11] In the

[11] A national survey of employers under the auspices of the Health Insurance Institute of America in 1988 documented the dramatic shift from insured to self-insured plans since ERISA. It concluded that, whereas 5 percent of employees were enrolled in self-insured health plans in 1975, over 60 percent were enrolled in self-insured plans in 1987, and the principal explanation was the desire to avoid varying state insurance laws. Gabel, Jajich-Toth,

same way, as noted in our opening brief (at 39-40), the threat of state court actions, tried to a jury, with punitive damages, would create a strong disincentive to establish or continue pension plans. Even if an employer established or continued a plan, there would be strong pressure to alter the vesting rules in the plan to minimize the risk of lawsuits—either delaying vesting for as long as possible or avoiding the problem by providing full and immediate vesting. And, where an employer operates in more than one state, varying state law requirements would push the employer toward breaking up the plan into separate pieces or reducing the plan to the lowest common denominator—a Hobson's choice that ERISA pre-emption was specifically designed to avoid. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 514, 524-525 (1981).

In any event, respondent's casual doubt about the magnitude of the threat is beside the point. Congress employed blanket pre-emption in Section 514(a) in order to avoid any balancing tests—to avoid "endless litigation over the validity of State action that might im-

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de Lissovoy, Rice & Cohen, *The Changing World of Group Health Insurance*, 7 Health Affairs 48, 58-59 (1988).

See also More Companies Choosing to Self-Insure Benefits, N.Y. Times, August 3, 1990, at D10 ("51 percent of the firms that converted to self-insurance from 1981 to 1984 would not have done so if there were no state-mandated benefits."); *Laws on Health Benefits Raise Firms' Ire*, Wall St. J., December 28, 1988, at B1 ("To avoid the added insurance costs, many large companies are adopting self-insurance plans, which are exempt from the mandate laws. And because only those companies that offer health plans are obliged to offer the benefits imposed by the mandates, some concerns have decided not to offer insurance plans at all."); *State Mandates Raise Insurance Costs, Keep Employers from Offering Coverage*, 17 Pension Reporter (BNA) No. 16, at 647 (April 16, 1990) ("Research on the effect of state mandates on employer-sponsored health insurance coverage has shown that mandates increase costs and discourage some employers from sponsoring health coverage for workers. . . .").

pinge on Federal regulation" (120 Cong. Rec. 29942 (1974), *reprinted in* 3 *Legislative History*, at 4770 (remarks of Sen. Javits)).

5. Finally, there is no basis to respondent's contention (Resp. Br. 30) that petitioner cannot raise the ERISA pre-emption defense in this case. This Court has long held that, where the highest court of a state has actually passed on a federal question, any inquiry into how or when the question was raised in the state courts in irrelevant to the exercise of the Court's jurisdiction. *See Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185-186 (1945); *see also Orr v. Orr*, 440 U.S. 268, 274-275 (1979); *Raley v. Ohio*, 360 U.S. 423, 436-437 (1959). The Supreme Court of Texas passed on petitioner's ERISA pre-emption defense, and this Court's review of that decision is therefore entirely appropriate.

For these reasons, as well as those set forth in our opening brief, the judgment of the court below should be reversed and remanded.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY, PETITIONER

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 (ERISA) preempts a state common law claim that an employer unlawfully discharged an employee in order to interfere with his attainment of benefits under a plan covered by ERISA.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Respondent brought a state common law action claiming, *inter alia*, that petitioner, his former employer, discharged him in order to prevent his pension benefits from vesting. The question presented is whether that claim is preempted by the Employee Retirement Income Security Act of 1974 (ERISA). This case therefore involves the application of three provisions of that statute: (1) Section 510, 29 U.S.C. 1140, which prohibits employers from interfering with the attainment of benefits promised under plans governed by ERISA; (2) Section 502, 29 U.S.C. 1132, which confers exclusive jurisdiction on

federal district courts to award appropriate relief to prevent and redress violations of Section 510; and (3) Section 514(a), 29 U.S.C. 1144(a), which preempts state laws relating to employee benefit plans.

The Texas Supreme Court held that the public policy embodied in Section 510 may form the basis of a state wrongful discharge action. Pet. App. 5a. The Secretary of Labor enforces the reporting, disclosure, and fiduciary obligations that ERISA imposes on private employee benefit plans. More specifically, Section 502(h), 29 U.S.C. 1132(h), provides that parties bringing suit to enforce their rights under Section 510 must notify the Secretary of the action, and further provides that she has the right to intervene in any such action. The Secretary therefore has a strong interest in the proper interpretation of Section 510 and of ERISA's preemption and enforcement provisions.

STATUTORY PROVISIONS INVOLVED

Section 502 of ERISA, 29 U.S.C. 1132, provides in pertinent part:

(a) **Persons empowered to bring a civil action**

A civil action may be brought—

* * * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * * *

(e) **Jurisdiction**

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

* * * *

Section 510 of ERISA, 29 U.S.C. 1140, provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Section 514 of ERISA, 29 U.S.C. 1144, provides in pertinent part:

(a) **Supersedure; effective date**

Except as provided in subsection (b) of this section, the provisions of this subchapter and

subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

STATEMENT

Petitioner Ingersoll-Rand Company employed respondent Perry McClendon as a salesman and distributor of construction equipment. After nine years and eight months of service, McClendon was fired by the company, which cited general economic factors as the reason for the discharge. Pet. App. 1a-2a, 18a.

McClendon sued the company in state court. He first alleged that the discharge had deprived him of a sizable commission on a sale of equipment for which he had laid the groundwork. He also asserted that his pension would have vested in another four months and that a principal reason for the discharge was the company's desire to avoid making contributions to his pension fund. Ingersoll-Rand countered that allegation by presenting an affidavit stating that McClendon's pension benefits had, in fact, vested under the terms of the plan. Pet. App. 13a. McClendon apparently failed to understand that, pursuant to the break-in-service regulation, 29 C.F.R. 2530.200b-4, he had been credited with sufficient service to vest under the plan's ten-year requirement. However, McClendon continued to allege that the company had acted in bad faith when it discharged him, and did so in part in order to avoid making pension payments. Pet. App. 2a n.2. Based on these allegations, he alleged state common law causes of action sounding in tort and contract. McClendon sought both

compensatory damages (recovery for lost future wages and mental anguish) and punitive damages.

The state district court granted the company's motion for summary judgment (Pet. App. 25a-26a), and the state court of appeals affirmed (*id.* at 17a-24a). The court of appeals ruled that McClendon's employment was "at will" because the agreement governing his commissions, upon which McClendon had relied, expressly contemplated the possibility of termination at any time and there was no other indication of a good cause limitation on the company's right to terminate. *Id.* at 20a, 22a. The court further refused to recognize an implied covenant of good faith and fair dealing applicable to the employment relationship. *Id.* at 22a-24a. The court also upheld summary judgment against respondent's claim of intentional infliction of emotional distress, holding that the discharge was neither extreme nor outrageous. *Id.* at 24a.

A divided Texas Supreme Court reversed and remanded for trial. Pet. App. 1a-16a. The court applied "the principle that public policy can limit an employer's power to discharge at-will employees," and found that "the state has an interest in protecting employees' interests in pension plans." *Id.* at 4a, 5a. In reaching that conclusion, the court cited a state statute relating to the pension plans of public employees and relied on Section 510 of ERISA. The court noted that Section 510 "makes it unlawful for any person to discharge, fine, suspend or discriminate against any employee for the purpose of interfering with that employee's potential rights under a pension plan." Pet. App. 5a. The court added that "[t]he very passage of ERISA demonstrates the great significance attached to income security for

retirement purposes." *Ibid.* It therefore held that a plaintiff may bring a wrongful discharge action under Texas law alleging that "the principal reason for [the] termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund." *Ibid.* Cases in which federal courts had found that ERISA preempts wrongful discharge claims were distinguished on the ground that McClendon "is *not* seeking lost *pension benefits* but is instead seeking future wages, mental anguish and punitive damages as a result of the wrongful discharge." *Id.* at 5a n.3.[1]

Four justices dissented. They all agreed that ERISA preempts the state cause of action that the court had recognized. Pet. App. 5a-9a, 13a. Justice Cook, joined by two other justices, explained that claims for violation of Section 510 of ERISA are enforceable under Section 502(a)(3), and that Section 502(e) confines litigation of such claims to federal courts. Pet. App. 7a. While it is "possible for state and federal law to address the same problem," Justice Cook continued, ERISA expressly provides in Section 514(a) that the federal statute preempts all state laws that "relate to" employee benefit plans. Pet. App. 7a. Moreover, he added, this Court had held in *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41 (1987), that ERISA's enforcement provision has a broad preemptive effect. Pet. App. 7a. Justice Cook concluded that ERISA provides employees such as McClendon "with a real and enforceable claim that they may bring in federal court and at the same time supersedes the claim manufactured today." *Id.* at 8a-9a.

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[1] Because of its reliance on Section 510, the court did not reach McClendon's claim that the company had breached a duty of good faith and fair dealing. Pet. App. 2a n.1.

SUMMARY OF ARGUMENT

As all of the federal courts of appeals to consider the matter have agreed, state wrongful discharge actions grounded on allegations that the employer sought to interfere with the attainment of rights under an employee benefit plan are preempted by ERISA. *Fitzgerald* v. *Codex Corp.*, 882 F.2d 586, 588 (1st Cir. 1989); *Pane* v. *RCA Corp.*, 868 F.2d 631, 639 (3d Cir. 1989); *Sorosky* v. *Burroughs Corp.*, 826 F.2d 794, 799-800 (9th Cir. 1987). This is so for two closely related reasons.

A. A claim alleging interference with the attainment of benefits "relate[s] to" an employee benefit plan within the meaning of ERISA's broad preemption provision, Section 514(a). This case illustrates how such claims "relate to" employee benefit plans, since the meaning of the terms of Ingersoll-Rand's plan are central to McClendon's claim and to the company's defense. If the case is tried, McClendon will contend that he was discharged in part because the persons responsible for that decision thought his pension was about to vest, while the company will stress that, under the terms of the plan, the pension had vested.

In addition, Section 510 of ERISA makes clear that, in Congress's view, actions alleging interference with the attainment of benefits "relate to" employee benefit plans. Indeed, the protections set out in Section 510—the provision prohibiting interference with the attainment of benefits—are plainly necessary to ensure that ERISA's other provisions are not evaded since, for example, "[n]o vesting formula will produce real employee protection so long as employers are free to fire employees to defeat pension eligibility." 119 Cong. Rec. 30,374 (1973) (statement of Sen. Hartke).

Furthermore, allowing state law claims analogous to ERISA actions enforcing Section 510 would interfere with Congress's purpose in enacting ERISA's broad preemption provision. As this Court has recognized, Congress preempted state law in Section 514(a) so that employee benefit plans would be governed by a single set of regulations. *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987). If state law actions are also permitted, employers will be required to amend their practices to conform to the additional requirements the States might impose.

B. A state law claim analogous to a claim under Section 510 also is preempted because the enforcement provisions in Section 502(a) of ERISA have a particularly powerful preemptive effect. In enacting Section 502(a), Congress compared the provision to Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185, and indicated that the courts were to develop federal common law to govern employee benefit plans. As this Court has recognized, "Congress was well aware [of] the powerful preemptive force of § 301. * * * The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop, indeed, the entire comparison of ERISA's § 502(a) to § 301 of the LMRA, would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws." *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 55-56 (1987). That conclusion is reinforced by the fact that, under Section 502(e) of ERISA, actions to enforce Section 510 may be brought only in federal court.

Allowing supplemental remedies would undermine the balanced remedial approach that Congress

adopted. When it enacted Section 502(a)(3), Congress decided to authorize make-whole relief for the victim of a violation of Section 510, but it was also concerned to avoid unduly burdening employers that choose to adopt employee benefit plans. The relief available under Section 502 to remedy violations of Section 510 is in fact ample. See, *e.g.*, *Folz* v. *Marriott Corp.*, 594 F. Supp. 1007 (W.D. Mo. 1984) (awarding back pay, front pay, restitution of benefits, and prejudgment interest). As the dissenters on the Texas Supreme Court stated, persons like McClendon should be limited to the avenue of relief that Congress has authorized. Pet. App. 8a-9a.

ARGUMENT

ERISA PREEMPTS STATE LAW CLAIMS ALLEGING THAT AN EMPLOYER DISCHARGED AN EMPLOYEE IN ORDER TO INTERFERE WITH THE ATTAINMENT OF EMPLOYEE BENEFITS

Congress enacted ERISA in 1974 after nearly a decade of studying the operation of private employee pension and welfare benefit plans. *Central States Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 569 & n.9 (1985); *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 361 (1980). Congress found that there had been enormous growth in employee benefit plans in recent years and that "the continued well-being and security of millions of employees and their dependents are directly affected by these plans." 29 U.S.C. 1001(a). Congress established in ERISA a comprehensive regulatory framework to "assur[e] the equitable character of such plans and their financial soundness" (*ibid.*), and thereby to "protect * * * participants in employee benefit plans and their beneficiaries" (29 U.S.C. 1001(b)).

The ultimate goal of ERISA is to assure that employees and their beneficiaries actually receive the benefits they have been promised. See *Nachman Corp.*, 446 U.S. at 375. To that end, the Act imposes strict fiduciary duties on all persons who exercise discretion over the operation of any employee benefit plan. 29 U.S.C. 1101-1114. With respect to pension plans, Congress set minimum funding requirements (29 U.S.C. 1081-1086), established participation and vesting standards (29 U.S.C. 1051-1061), and created an insurance program to pay benefits promised by employers who become insolvent (29 U.S.C. 1301-1461).

Section 510 of ERISA is central to Congress's scheme. It provides that employers may not discharge or otherwise discriminate against an employee who is participating in an employee benefit plan "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." Section 510 is a necessary part of ERISA because without it, employers would be able to avoid the payment of benefits that they had promised to provide. S. Rep. No. 127, 93d Cong., 1st Sess. 35 (1973); H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973); 119 Cong. Rec. 30,374 (1973) (statement of Sen. Hartke). For example, in order to avoid its obligations, an unscrupulous employer might discharge an employee shortly before the right to retirement benefits was to vest or, where participation in a health plan required continued employment, might discharge an employee who had been diagnosed as suffering from a serious illness. Section 510 is enforced under Section 502(a)(3), one of the "six carefully integrated civil enforcement provisions found in § 502(a)." *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 146 (1985).

The "crowning achievement" of the statute was its "reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans." 120 Cong. Rec. 29,197 (1974) (statement of Rep. Dent). In Section 514(a), Congress expressly preempted "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." Congress broadly defined "State law" to include "all laws, decisions, rules, regulations, or other State action having the effect of law." Section 514(c). And, as this Court has repeatedly instructed, Section 514(a) is "deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. at 46 (quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)). "The pre-emption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985).

Not surprisingly, in light of these provisions, the federal courts of appeals that have addressed the issue have all found that ERISA preempts state wrongful discharge actions premised on employer interference with the attainment of rights under employee benefit plans. *Fitzgerald* v. *Codex Corp.*, 882 F.2d 586, 588 (1st Cir. 1989); *Pane* v. *RCA Corp.*, 868 F.2d 631, 639 (3d Cir. 1989); *Sorosky* v. *Burroughs Corp.*, 826 F.2d 794, 799-800 (9th Cir. 1987).[2] See also *Authier* v. *Ginsberg*, 757 F.2d 796

[2] In addition to the court below, one state court and two federal district courts have held to the contrary. See *K Mart Corp.* v. *Ponsock*, 732 P.2d 1364, 1365 (Nev. 1987); *Savodnik* v. *Korvettes, Inc.*, 488 F. Supp. 822, 826 (E.D.N.Y. 1980);

(6th Cir.), cert. denied, 474 U.S. 888 (1985) (preemption of action by fiduciary for unlawful termination); *Dependahl* v. *Falstaff Brewing Corp.*, 653 F.2d 1208, 1215-1216 (8th Cir.), cert. denied, 454 U.S. 968 and 1084 (1981) (preemption of state law tort claims based on alleged interference with benefit rights). Accord *Conaway* v. *Eastern Associated Coal Corp.*, 358 S.E.2d 423, 427 (W. Va. 1986).

A. A State Law Claim That An Employee Was Discharged So That Retirement Benefits Would Not Vest Is Preempted Because It "Relate[s] To" An Employee Benefit Plan Within The Meaning Of Section 514(a)

McClendon's claim that Ingersoll-Rand discharged him so that his pension would not vest states a cause of action under Section 510. Indeed, it is a classic example of the sort of claim that Congress intended to be brought under that provision. It is therefore clear that his allegation "relate[s] to" an employee benefit plan and is preempted under Section 514(a).

The heart of McClendon's claim is that Ingersoll-Rand terminated him because it thought that if he worked for the company for another four months, his retirement benefits would vest. Accordingly, the terms of the plan would play a key role in any trial of his state law claim. In the normal case, a plaintiff like McClendon would attempt to show that the plan called for an expenditure that the company avoided by discharging him. In this case, which is somewhat unusual since it is undisputed that McClendon's pension had in fact vested, the company would undoubtedly argue that there is no merit to McClendon's claim because, under the terms of the

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Hovey v. *Lutheran Medical Center*, 516 F. Supp. 554, 557-558 (E.D.N.Y. 1981).

plan, McClendon's benefits had vested prior to his discharge. McClendon, in turn, would most likely respond that the persons responsible for his discharge misunderstood the terms of the plan and discharged him because they thought his benefits were about to vest. In any event, the meaning of the terms of the plan would lie at the core of this case, as in any similar case, so that a state law action would have "a connection with or reference to" the plan. *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).

In *Shaw*, the Court noted that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." 463 U.S. at 100 n.21. We would agree that a state wrongful discharge claim is not preempted under that standard if the plan is relevant only to the computation of damages. Thus, for example, if McClendon had prevailed on his state law claim that he was discharged in violation of the terms of his compensation agreement with Ingersoll-Rand, then it would have been appropriate for the court, as part of its remedy, to order his reinstatement in the pension plan or to award damages equivalent to the value of his pension benefits under the plan, and such an order would not be preempted. *Pizlo* v. *Bethlehem Steel Corp.*, 884 F.2d 116, 120-121 (4th Cir. 1989); *Totton* v. *New York Life Insurance Co.*, 685 F. Supp. 27, 31 (D. Conn. 1987); *Schlenz* v. *United Airlines, Inc.*, 678 F. Supp. 230, 234-236 (N.D. Cal. 1988); *Coontz* v. *Gordon Jewelry Corp.*, 439 N.W.2d 223, 226 (Iowa Ct. App. 1989). But more than the terms of a remedial order are at issue here. The essence of petitioner's claim that he was unlawfully discharged

necessarily involves the meaning of the terms of the plan.

The need for preemption is underscored by the existence of Section 510. Because it determined that Section 510 was essential to the accomplishment of its objective of ensuring the receipt of promised benefits, Congress included that provision in ERISA's "administration and enforcement" section. The provision was motivated by "evidence that in some plans a worker's pension rights or the expectations of those rights were interfered with." S. Rep. No. 127, 93d Cong., 1st Sess. 36 (1973). Congress therefore added Section 510 "to completely secure the rights and expectations brought into being" by ERISA. H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973). As Senator Hartke stated, "[n]o vesting formula will produce real employee protection so long as employers are free to fire employees to defeat pension eligibility." 119 Cong. Rec. 30,374 (1973). At the least, Congress thought that the right it was creating in Section 510 "relate[d] to" employee benefit plans.

A state law claim such as the one recognized by the Supreme Court of Texas is duplicative of the cause of action available under Section 510, and the availability of a duplicative state cause of action inevitably conflicts with the federal scheme. As this Court recently noted in *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987), one effect of ERISA's broad preemption of state law is that it "afford[s] employers the advantages of a uniform set of administrative procedures governed by a single set of regulations." Congress recognized that "employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex ad-

ministrative activities," and that if "[f]aced with the difficulty or impossibility of structuring administrative practices according to a set of uniform guidelines, an employer may decide to reduce benefits or simply not to pay them at all." *Id.* at 11, 13; see also *Shaw*, 463 U.S. at 105 n.25. ERISA's broad preemption provision encourages the formation of private employee benefit plans "by eliminating the threat of conflicting and inconsistent State and local regulation." 120 Cong. Rec. 29,197 (1974) (remarks of Rep. Dent); see also *id.* at 29,933 (remarks of Sen. Williams).

It is not hard to see how state laws paralleling Section 510 could cause the problems Congress sought to avoid. For example, one State might adopt a presumption of discrimination against any employee who was discharged within a year before the vesting of his pension benefits, while another State might adopt a different period, or might decide that the presumption depended on the amount of the benefits that would vest. In that event, if state rules were not preempted, an employer faced with differing requirements would have to decide whether it nevertheless wished to adopt a benefit plan and, if it did, would have to adjust its employment practices in the various States in which it operated. But when Congress created certain rights and remedies relating to benefit plans in Sections 510 and 502(a) and provided for preemption of all state laws also relating to those plans, it clearly barred the application of laws that would make the operation of employee benefit plans more onerous. See *English* v. *General Electric Co.*, No. 89-152 (June 4, 1990), slip op. 6 & n.5.

Furthermore, it should be noted that "[t]he bill that became ERISA originally contained a limited

pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA." *Shaw*, 463 U.S. at 98; see H.R. 2, 93d Cong., 1st Sess. § 699(a) (1973) (preempting state laws relating "to the subject matters regulated by this Act"). The Conference Committee broadened ERISA's preemptive scope. In doing so, it certainly did not intend to allow state causes of action analogous to those it authorized in Section 510. To the contrary, as the First Circuit stated in another case where the focus of the plaintiff's claim was interference with the attainment of benefits: "This is precisely the type of action that section 510 sought to cover and that is essential to the Act's protection. Thus, this action is 'necessarily federal in character by virtue of the clearly manifested intent of Congress.'" *Fitzgerald* v. *Codex Corp.*, 882 F.2d at 588, quoting *Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. 58, 67 (1987).

B. A State Law Claim Analogous To A Claim To Enforce Section 510 Is Preempted Because The Remedial Provisions In Section 502(a) Are Exclusive

The fact that Section 510 is enforceable under Section 502(a)(3) provides a related, yet distinct, reason why preemption is mandated in this case. "'The six carefully integrated civil enforcement provisions'" contained in Section 502(a) "set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Pilot Life*, 481 U.S. at 54, quoting *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. at 146. Even in the absence of ERISA's express preemption provision, it would be

clear that actions such as McClendon's are preempted.

Section 502(a)(3) provides that any plan participant or beneficiary may bring a civil action to prevent or redress a violation of "any provision of this subchapter" (which includes Section 510) or of "the terms of the plan." Under Section 502(e), a cause of action under Section 502(a)(3) may be brought only in a federal district court, and Section 502(a)(3) states that injunctive relief is available in such actions and that a federal court may also grant "other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." This Court has recognized that Congress intended the federal courts to develop "a federal common law of rights and obligations" under Section 502(a). *Pilot Life*, 481 U.S. at 56.

The district courts that have found violations of Section 510 have properly awarded broad relief. For example, in *Folz* v. *Marriott Corp.*, 594 F. Supp. 1007 (W.D. Mo. 1984), the court concluded that the employer, which operated a self-funded medical benefits plan, had discharged the plaintiff after he contracted multiple sclerosis in order "to avoid the adverse economic impact which that disease could have under Marriott's employee benefit plans." *Id.* at 1013. It rejected the employer's contention that "relief under ERISA should be limited to reinstating the plaintiff as a benefit plan beneficiary, and that reinstatement to employment and back pay are not appropriate remedies." *Id.* at 1015. Rather, the court concluded that Congress intended to authorize relief that would make a plaintiff whole for the violation of Section 510. 594 F. Supp. at 1016. It ac-

cordingly awarded back pay, front pay, restitution of forfeited benefits, and prejudgment interest on the back pay award.

Similarly, in *Bittner* v. *Sadoff & Rudoy Industries*, 490 F. Supp. 534, 536 (E.D. Wis. 1980), the court held that it had "equitable power to put plaintiff back into the position he enjoyed before the discharge," and could award "back pay, reinstatement to his former position, restitution of his forfeited employee benefits, and any other relief necessary to make him whole." The court in *Vogel* v. *Independence Federal Savings Bank*, 692 F. Supp. 587, 596 (D. Md. 1988), while deciding that punitive damages may not be awarded in cases involving violations of Section 510, thought that other forms of extracontractual damages are available, including "recovery for mental distress or for money loss above and beyond the contractual terms." Thus, while the full extent of the relief available under Section 502 (a)(3) is unclear, especially with respect to extracontractual damages (see *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. at 139 n.5), it is clear that generous remedies are available to plaintiffs who prove violations of Section 510.

Thus, there is no merit to the Texas Supreme Court's suggestion (Pet. App. 5a n.3) that the cause of action it created does not overlap or conflict with Congress's scheme because the state-law claim contemplated an award of damages from an employer, not benefits from a plan. The focus of Section 510 is on employers, and a make-whole remedy under that provision would almost always include an award of back pay from an employer. The remedy might also include an award of benefits or reinstatement in a benefit plan, but such an award is not required by

or essential to the congressional scheme, and (as here) may not be appropriate in a particular case.[3]

Because Congress has provided a remedy to enforce Section 510 and has further instructed the federal courts to develop a federal common law of rights and remedies under Section 502(a)(3), the decision in *Pilot Life* makes it clear that the federal remedy is exclusive. *Pilot Life* involved the question whether a state law action asserting improper processing of a benefit claim was preempted. The Court held that it was, and relied primarily on "the clear expression of congressional intent that ERISA's civil enforcement scheme be exclusive." 481 U.S. at 57. The Court based its conclusion on the "deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies." 481 U.S. at 54. The Court also noted that the Conference Report compared Section 502(a) with Section 301 of the Labor-Management Relations Act of 1947 and stated that "Congress was well aware [of] the powerful pre-emptive force of § 301." 481 U.S. at 55, citing H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974). The Court explained that "[t]he expectations that a federal

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[3] Similarly, there is no merit to respondent's contention (Br. in Opp. 16) that the Texas Supreme Court's decision is consistent with cases such as *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985). In that case, the plaintiffs asserted that their former employer had schemed with their current employer to eliminate their right to severance benefits. The court noted that "the heart of the matter" was that the current employer had no severance pay plan, so that to preempt the plaintiffs' state law claims "would leave them without an avenue of redress." *Id.* at 1506. In the absence of a cause of action under Section 502(a), the court allowed the claim to go forward. In this case, of course, McClendon has a cause of action under Section 502(a)(3).

common law of rights and obligations under ERISA-regulated plans would develop, indeed, the entire comparison of ERISA's § 502(a) to § 301 of the LMRA, would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws." 481 U.S. at 56.

To the extent that the issue presented here differs from the issue in *Pilot Life*, the differences make this an even clearer case. Thus, *Pilot Life* involved a claim for benefits, and those claims may be brought in either state or federal court under Section 502(e). In cases such as this, however, Section 502(e) provides that *only* federal courts have jurisdiction. Moreover, it was argued in *Pilot Life* that the state law claim pertaining to bad faith processing of a benefit claim was a law regulating insurance, and therefore was expressly excepted from the preemption provision by Section 514(b)(2)(A), 29 U.S.C. 1144(b)(2)(A) (the insurance saving clause). No similar exception applies in this case.

State supplementation of the federal remedy threatens serious interference with the federal scheme. Congress has not specified every detail with respect to the remedies available under Section 502(a); instead it has instructed the federal courts to develop a federal common law of ERISA remedies and it has provided guidance to the federal courts from which they can fashion that common law. Put most simply, Congress, while enacting ERISA to ensure that employees would obtain the benefits they were promised, was also concerned that the requirements it imposed not be so burdensome that employers would be forced to reduce benefits or to eliminate them altogether. The federal courts must consider these dual objectives, which are in tension, in fashioning the remedies available under Section 502(a). The fifty States might not agree with the federal approach, or with each other. Indeed, the Texas Supreme Court appeared to be unaware that by creating a state wrongful discharge action that would permit an award of punitive damages, it had added significantly to the potential cost of operating employee benefit plans. In this respect, as in many others, allowing the States to add to the remedies available under ERISA would upset the balance to be achieved under federal law.

CONCLUSION

The judgment of the Texas Supreme Court should be reversed.

Respectfully submitted.

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THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1989 TERM

INGERSOLL-RAND CO., petitioner

v.

McCLENDON, respondent

APPEAL FROM THE SUPREME COURT OF TEXAS

McCLENDON v. INGERSOLL-RAND CO., NO. C-7973

BRIEF OF AMICUS CURIAE

ON BEHALF OF RESPONDENT

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135 Cong. Rec., *Conference Report on HR 3299, Omnibus Budget Reconciliation Act of 1989*, November 21, 1989, at H9453-4 and H9603-04 **6, 16, 17, 23.**

Kracov, *Extracontractual Damages under ERISA: Recent Developments Under the Civil Enforcement and Preemption Provisions*, 17, No. 2 BNA Tax Management Compensation Planning Journal, at 23, at 25 (February 3, 1989) **12, 13, 16, 20.**

National Law Journal, at page 6 (April 30, 1990) **25.**

Note, *ATTORNEY FEES UNDER ERISA: WHEN IS AN AWARD APPROPRIATE?* 71 Cornell L. Rev. 1037, at 1062 (1986) **18.**

Note, *ERISA-Preemption-Pilot Life Insurance Co. v. Dedeaux: CONGRESS'S CUE TO REASSESS ERISA'S PREEMPTIVE EFFECT*, 36 U. KAN. L. REV. 611-625 (1988) **6, 14, 19.**

Statement of Sen. Harrison A. Williams, Jr., *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS 5177 **6.**

D. Sweetman, *License to do Evil?* Natl L. J., at 13-14 (November 6, 1989) and G. Crovitz, *Absurd Punitive Damages Also "Mock" Due Process*, Wall St. J., at A15 (March 14, 1990) **26.**

THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1989 TERM

INGERSOLL-RAND CO.,	)	
petitioner	)	
v.	)	Docket No. **89-1298.**
McCLENDON,	)	Brief of Amicus Curiae.
respondent	)	

I. THE AMICUS CURIAE'S INTEREST IN THIS CASE

The amicus curiae has three reasons for his interest in this case.[1] First, he is counsel to a plaintiff/appellant in another case currently pending before the 10th Circuit Court of Appeals in which the issues of ERISA preemption and remedies are determinative.[2] Second, in *Leiding*, the defendants have asked for frivolous filing sanctions against counsel and plaintiff because plaintiff's counsel asked for civil monetary penalties as part of plaintiff's ERISA

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[1] The amicus curiae does not seek oral argument and would agree to oral argument only if requested. Both parties have consented in writing to this amicus curiae brief.

[2] *Leiding v. Federal Deposit Insurance Corporation*, No. 88-C-1567-B (N.D. Okla. March 21, 1990), *appeal docketed, Leiding v. Brookside State Bank*, No. 90-5078 (10th Cir. March 23, 1990) (common law equitable estoppel, monetary civil penalties and Rule 11 sanction issues).

remedies.[3] Third, as an adjunct professor for deferred compensation and employee benefits in the University of Tulsa's Masters in Taxation program, the amicus curiae has spent a great deal of time reviewing ERISA preemption cases. As a result of that study, he has come to believe that since *Pilot Life,*[4] the courts are inadequately protecting aggrieved participants and inadequately deterring violations of ERISA. *Pilot Life* has inhibited the needed development of a federal common law of remedies under ERISA for unreasonable delay or refusal to process bona fide partticipant claims.[5]

II. SUMMARY OF ARGUMENT

The Court should affirm the Texas Supreme Court for the reasons stated in respondent McClendon's brief and by the Texas Supreme Court. However, this case would not be before this Court if there were not a legitimate difference of opinion on the scope of preemption and remedies under ERISA. Thus the Court's duty does not end with a finding of preemption, if that is the Court's decision in this case.

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[3] Application for FCvP Rule 11 sanctions, Record entry #118 *Leiding v. Federal Deposit Insurance Corporation*, No. 88-C-1567-B (N.D. Okla. December 7, 1989), *cross-appeal docketed*, No. 90-5090 (10th Cir. April 12, 1990) (monetary civil penalties for violation of ERISA and other Rule 11 sanction issues).

[4] *Pilot Life Insurance Co. v. Dedeaux*. 481 U.S. 41 (1987).

[5] The views expressed in this brief are those of the amicus curiae. The amicuscuriae in no way means to imply that these views are also those of the University of Tulsa or anyone else affiliated with the University of Tulsa.

Assuming preemption, the Court should hold that, regardless of the labels used by the state court, this state court decision is consistent with the recent trend of federal district court decisions under ERISA §510 [29 USC §1140] for willful violations of ERISA, e.g., *Vogel v. Independence Federal Sav. Bank*,[6] and *McRae v. Seafarers Welfare Fund*.[7] To adequately protect participants, McClendon's state law cause of action should also be absorbed into federal common law under ERISA as was the case in the *Amos*[8] district court decision. Thus the Texas Supreme Court decision should be affirmed. Ingersoll-Rand did not suffer prejudice. The same result would have occurred under federal law.

Alternatively, rather than simply reversing if the Court disagrees with the reasoning of *Amos*, *Vogel*, and *McRae*, the Court should consider the extensive and generally negative feedback its *Pilot Life* decision has received in the lower federal courts, in Congress, and in scholarly legal publications. To be blunt, this Court is not allowing ERISA to fulfil its most basic function. The

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[6] *Vogel*, 692 F.Supp. 587 (1988).

[7] *McRae*, No. 88-0544T, _____ F.Supp. _____ 11 EBC 2274 (D.C. S. Ala. 1989) (Relied on *Russell* concurring opinion to find $50,000 in extracontractual damages for delays in processing a participant's claim for approximately $7,000 in unpaid medical services. The Court found extreme aggravation, humiliation and a ruined credit rating).

[8] *Amos v. Blue Cross-Blue Shield of Alabama*, 681 F.Supp. 1515 (N.D. Ala. 1988), *rev'd* 868 F.2d 430 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 158 (1990).

experience since *Pilot Life* demonstrates that plan participants are not adequately protected when *Pilot Life* is interpreted to stop the development of a federal common law of remedies for ERISA. *Pilot Life*, as applied by the federal appellate courts, neither protects plan participants nor deters similar violations of ERISA when a legitimate benefit entitlement has been totally disregarded by the employer or where the processing of a legitimate benefit claim has been unreasonably delayed by the plan fiduciary.

To adequately protect aggrieved plan participants, the Court should consider some civil penalty as a remedy which can be both easily administered by a trial court and is not unduly burdensome to employers. A per diem civil penalty like that of ERISA §502(c)(1) [29 USC §1132(c)(1)] meets these two criteria. A per diem penalty also provides deterrence to other potential violations of ERISA and restores the balance for protection of aggrieved plan participants.

On remand, the Court should suggest that the Texas courts consider a per diem civil penalty if it preempts McClendon's state law claim and also rejects the reasoning of *Amos* on *absorption* of state law claims or *Vogel* and *McRae* on willful violations of ERISA.

III. ARGUMENT

I. A BRIEF HISTORY OF ERISA'S PREEMPTION OF STATE LAW UP TO *RUSSELL* AND *PILOT LIFE*.

> *The ERISA quicksand is fast swallowing up everything that steps in it or near it. Jordan v. Reliable Life Ins. Co.*, (Acker, J.).[9]

The United States has two major systems for determining substantive rights for employer-provided benefits and remedies for violation of those substantive rights. Traditionally, state law governed these rights and remedies. Such state law was based on statute, common law, equity or administrative regulation. In 1974, a comprehensive federal regulatory program, ERISA, was enacted for governing many of the same employee benefit plans previously governed by state law.

Preemption of much of the pre-existing state law applicable to employee benefit plans was a major objective of Congress when it passed ERISA. Representative John A. Dent, House sponsor of ERISA, stated that "the reservation to Federal authority the *sole* power to regulate the field of employee benefit plans" is the statute's "crowning achievement."[10] "It should be stressed," stated Senator Harrison A. Williams, Chairman of the Senate Labor & Public Welfare Committee, upon introduction of the ERISA Conference Report, "that with the narrow exceptions specified in the bill, the substantive and enforcement provisions [of ERISA] are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting

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[9] *Jordan*, 694 F. Supp. 822, at 827 (N.D. Ala. 1988).

[10] 120 CONG. REC. 29,197 (1974) (remarks of Rep. Dent) (*emphasis added*).

or inconsistent State or local regulation of employee benefit plans."[11]

Judge Acker summed up the reach of ERISA preemption in one sentence. It is broad--very broad. The learned writers in Law Reviews and Journals are in agreement.[12] At least until OBRA 1989,[13] there was a dramatic difference in outcomes depending on whether or not a participant's state law claim was preempted under ERISA. For instance in *HealthAmerica v. Menton*, the

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[11] Statement of Sen. Harrison A. Williams, Jr., reprinted in 1974 U.S. CODE CONG. AND ADMIN. NEWS 5177.

[12] Comment, *ERISA Preemption of California Tort and Bad Faith Law: What's Left?* 22 U. S. F. L. REV. 519-559 (Winter/Spring 1988); Note, *ERISA-Preemption-Pilot Life Insurance Co. v. Dedeaux: CONGRESS'S CUE TO REASSESS ERISA'S PREEMPTIVE EFFECT*, 36 U. KAN. L. REV. 611-625 (1988); Case Comment, *BLIND FAITH CONQUERS BAD FAITH: ONLY CONGRESS CAN SAVE US AFTER PILOT LIFE INSURANCE CO. V. DEDEAUX*, 21 LOY. L. A. L. REV. 1343-1401 (June 1988); Comment, *Defining the Contours of ERISA Preemption of State Insurance Regulation: Making Employee Benefit Plan Regulation an Exclusively Federal Concern*, 42 VAND. L. REV. 607-638 (1989); Chittenden, *ERISA Preemption: The Demise of Bad Faith Actions in Group Insurance Cases*, 12 SOUTHERN ILL. UNIV. L. REV. 517-531 (Spring 1988); Bishop and Denney, HELLO ERISA, GOOD-BYE BAD FAITH: FEDERAL PRE-EMPTION OF DTPA, INSURANCE CODE, AND COMMON LAW BAD FAITH CLAIMS, 41 Baylor L. Rev. 269-289 (1989).

[13] 135 Cong. Rec., *Conference Report on HR 3299, Omnibus Budget Reconciliation Act of 1989*, November 21, 1989 ("P.L. 101-239" or "OBRA 1989").

difference was worth $1,797,588, the punitive damage amount awarded.[14]

In its several opportunities to address the scope of ERISA preemption under ERISA §514(a), the U. S. Supreme Court has opted for broad preemption.[15] The U. S. Supreme Court addressed the scope of the insurance law preemption exception in first in *Metropolitan Life Insurance Co. v. Massachusetts*[16] and later in *Pilot Life*.

In *Pilot Life*, the plaintiff brought suit asserting the state law tort of bad faith and breach of contract for failure to pay benefits under a group insurance policy. In a unanimous opinion, the U. S. Supreme Court reversed the 5th Circuit Court of Appeals and held that the plaintiff was not saved from preemption by the insurance savings clause, ERISA §514(b)(2)(A) [29 USC §1144(b)(2)(A)].[17] The *Pilot Life* Court held that the plaintiff's Mississippi common law bad faith action was preempted because it was not a state law that regulates insurance.[18]

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[14] *HealthAmerica v. Menton*, 551So.2d 235 (Ala. S. Ct. 1989) (under *Russell/Pilot Life* precedents, the most the *HealthAmerica* plaintiff would have gotten was $2,412 in plan benefits and part or all of his attorney fees), *cert. denied*, No. 89-939, _____ U.S. _____ (February 29, 1990).

[15] *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504, at 524-525 (1981); *Shaw v. Delta Airlines*, 463 U.S. 85 (1983).

[16] *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985).

[17] *Pilot Life*, 481 U.S. 41, at 57 (1987).

[18] Id. at 51.

It is at this point that Congress, in OBRA 1989, parted company with the Supreme Court. The Court went on to reenforce its initial *Metropolitan Life v. Massachusetts* preemption analysis with dicta[19] concerning the civil enforcement remedies of ERISA. The *Pilot Life* Court used the dicta in five (5) justice majority opinion in *Massachusetts Mut. Life Ins. Co. v. Russell*,[20] to state that the explicit statutory ERISA civil enforcement provisions were the exclusive and sole vehicles for the enforcement of employee benefit rights and obligations.

In *Pilot Life*, Justice O'Connor's unanimous opinion quoted language from the *Russell* majority opinion to state that the "six carefully integrated" civil enforcement provisions provided "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." Justice O'Connor concluded:[21]

> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive. This conclusion is fully confirmed by the legislative history of the civil enforcement provision.

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[19] Some courts treat the second half of *Pilot Life* as an alternative holding. *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489, at 494 (9th Cir. 1988), *cert. denied*, No. 88-1659, 57 U.S.L.W. 3841 (1989).

[20] *Russell*, 473 U. S. 134, at 146(1985) (J. Stevens for five (5) Justice majority). In *Russell*, the disagreement of the majority opinion with the four (4) justice concurring opinion, was over the majority's dicta which stated that the civil enforcement provisions found in ERISA §502 were the individual participant's *exclusive* remedies and that the six §502 remedies did not include *"legal"* remedies such as punitive damages.

[21] *Pilot Life*, 481 U.S. 41, 107 S. Ct. 1549, at 1556-57 (1987).

The 9th Circuit, in *Kanne v. Connecticut General Life*,[22] completed the cycle. On rehearing, the 9th Circuit was faced with a plan participant who based his cause of action on a provision in the California Insurance Code, §790.03(h)(2). The *Kanne* Court assumed "without deciding" that the plaintiff's statutory cause of action was "a law regulating insurance under the savings clause."[23] The 9th Circuit nevertheless decided that plaintiff's statutory cause of action was preempted because the remedy available to plaintiff for his cause of action would conflict with the ERISA remedies which *Pilot Life* had determined were the exclusive civil enforcement vehicles for individual participants.[24] Therefore the *Kanne* plaintiff was not entitled to extracontractual damages otherwise available for §790.03(h)(2).

In summary, the federal appellate courts and many federal district courts view the combination of *Russell* and *Pilot Life* as both a broadening of ERISA preemption and a restriction on their flexibility in devising remedies for failure to promptly process or pay claims under an ERISA plan. It is not surprising that the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuit Courts of Appeal have barred

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[22] *Kanne*, 867 F.2d 489 (9th Cir. 1988).

[23] *Kanne*, 867 F.2d 489, at 493.

[24] *Kanne*, 867 F.2d 489, at 494.

extracontractual damages or have interpreted *Russell* and *Pilot Life* as barring extracontractual damages in ERISA actions of participants.[25]

2. SOME JUDICIAL REACTIONS TO THE SIMULTANEOUS BROADENING OF ERISA PREEMPTION AND THE NARROWING OF ERISA REMEDIES.

Notwithstanding the numerous federal court opinions prohibiting extracontractual and punitive damages, the courts have not been pleased with the result in practice. The trial court in *McKinnon v. Blue Cross-Blue Shield of Alabama*, found that the denial of punitive damages *"no matter how egregious the breach of fiduciary obligation"* was *"strangely inconsistent"* with the *"central policy goal of ERISA"* which *"is to protect the interests of employees and their beneficiaries in employee benefit plans."*[26]

The absorption doctrine: The 11th Circuit's decision in *Amos v. Blue Cross-Blue Shield of Alabama*[27] is an example of a court which disagreed with the *Russell/Pilot Life* precedents but followed what it believed to be this Court's position nevertheless. The district court had applied an *"absorption"* theory to incorporate state law actions into ERISA. According to the district court, Congress provided authority for *absorption* in the direction to the federal courts to develop a federal common law of employee benefits. The 11th Circuit reversed the *Amos* district court stating:[28]

> Accordingly, we are compelled by controlling precedent to reverse the judgment of the district court. We acknowledge that *by eliminating the possibility that insurance companies may be liable for punitive or extracontractual damages, the courts are removing an historical disincentive to insurance company misbehavior.* Consequently, our decision may produce unintended results. However, *any change in the law's course will have to be charted by the Congress or the Supreme Court.*

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25 *Drinkwater v. Metropolitian Life Ins. Co.*, 846 F.2d 821 (1st Cir. 1988); *Pane v. RCA Corp.*, 868 F.2d 631 (3rd Cir. 1989); *Powell v. Chesapeake and Potomac Tel. Co.*, 780 F.2d 419 (4th Cir. 1985); *Sommers Drug Stores v. Corrigan Enterprises*, 793 F.2d 1456 (5th Cir. 1986); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981), *cert. denied*, 454 U.S. 968 (1981); *Sokol v. Berstein*, 803 F.2d 532 (9th Cir. 1986); *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988); and *Amos v. Blue Cross-Blue Shield of Alabama*, 868 F.2d 430 (11th Cir. 1988), *cert. denied*, 110 S. Ct. 158 (1989); *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, at 888 n.2 (10th Cir. 1988) (The 10th Circuit's position is not entirely clear because at 888 n.2, the court appears to disapprove punitive damages in ERISA cases, while at 894 n.4, the court appears to approve imposing civil penalties for a fiduciary's complete indifference to its plan duties). *See also Kleinhans v. Lisle Sav. and Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987); *Contra, Lorenzen v. Emp. Ret. Plan of Sperry & Hutchinson*, 896 F.2d 228, at 230 (7th Cir. 1990) (dicta quoted below indicates willingness to overrule *Kleinhans*).

26 *McKinnon*, 691 F.Supp. 1314, at 1315-16 (N.D. Ala. 1988).
27 *Amos*, 868 F.2d 430, *rev'g*, 681 F.Supp. 515 (N.D. Ala. 1988).
28 *Amos*, 868 F.2d 430, at 433 (*emphasis added*).

In contrast if the *Amos* case had been before the 7th Circuit, the 7th Circuit would have affirmed the district court. As stated by the 7th Circuit in *Lorenzen*:[29]

> ... as the concurring Justices in *Massachusetts Mutual Life Ins. Co. v. Russell,* pointed out, equitable relief, in a case involving a breach of fiduciary obligations, can include monetary payment, such as Mrs. Lorenzen sought in this case. "*Pilot Life* ... by holding that ERISA preempts suits under state tort law ... for improper processing of claims, *strongly implies that such suits can be brought under ERISA; for otherwise there would be a big gap in liability for misconduct* by ERISA-fiduciaries."

The *Amos* district court was a federal district court that had taken Justice Brennan's *Russell* hint to heart in holding extracontractual damages are available to aggrieved plan participants.[30] In Justice Brennan's view, the drafters of ERISA included the phrase "other appropriate equitable relief" in ERISA §502(a)(3) to allow the the federal courts to "fine tune" ERISA's remedial scheme in order to carry out the Congressional mandate to develop a *federal common law* of employee benefit plan rights and remedies.[31] In developing such federal

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[29] *Lorenzen*, 896 F.2d 228, at 230 (7th Cir. 1990) (*emphasis added*).

[30] *See also, Jordan*, 694 F.Supp. 822 (extensive analysis of *absorption* doctrine case law); *Bd. of Trustees v. Continental Assur. Co.*, __ F.Supp. _____, 1988 US Dist Lexis 6307 (W.D. Ark. 1988).

[31] *Russell*, 473 U.S. 134, at 156 (Justice Brennan concurring); *See also*, Kracov, *Extracontractual Damages under ERISA: Recent Developments Under the Civil Enforcement and*

common law, Justice Brennan believed that the courts should consider the monetary damages that can be awarded under state trust law.[32] This was because Justice Brennan believed such trust law remedies may "best effectuate the underlying purpose of ERISA-enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and the promotion of the best interests of participants and beneficiaries."[33] Congress recently echoed Justice Brennan's reasoning in its description of ERISA's remedy structure in the legislative history of OBRA 1989 discussed below.

If this Court decides that McClendon's claim is preempted, it should still affirm the Texas Supreme Court. When federal law recognizes the same claim in ERISA §510 and the same relief under the *absorption* doctrine, Ingersoll-Rand has not suffered any harm in the Texas courts.

Remedies for willful violation of ERISA: The blanket reluctance of the federal courts to find extracontractual

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Preemption Provisions, 17, No. 2 BNA Tax Management Compensation Planning Journal, at 23, at 25 (February 3, 1989) (The author is especially indebted to E. S. Kracov for his analysis of *Russell*, *Pilot Life* and the 1988 Congressional response).

[32] *Russell*, at 153 n.6 and at 157 ns.16-18; *See also Bruch v. Firestone Tire and Rubber Co.*, 489 U.S. _____, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989), *aff'g in part, rev'g in part, and remanding* 828 F. 2d 134 (3rd Cir. 1987) (The Supreme Court's statement in *Bruch*, that trust law applies to ERISA plans further supports Justice Brennan's concurring opinion).

[33] *Russell*, at 158.

damages under ERISA has been breached recently by courts straddling the line between *Russell* and *Pilot Life*.[34] Relying in part on Justice Brennan's concurring opinion in *Russell*, some federal district courts have found a *willful misconduct* exception to the prohibition against extracontractual damages. In *Vogel*, the plan participant alleged a variety of fiduciary violations and actions on the part of the employer, insurer and the insurance agency plan administrator which denied benefits to the participant under an employer-provided health insurance plan.[35] The *Vogel* Court held that "*willful misconduct*" justifies extracontractual damages where health care coverage and benefits are denied to a group health plan participant.

Under ERISA, it is now generally accepted that intentional, willful violation of ERISA will put the defendant plan fiduciary at risk to an award of extracontractual damages, possibly including punitive damages.[36] Recently, for instance, another district court adopted this position in *McRae v. Seafarers' Welfare Plan*.[37] However

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[34] Kracov, *Extracontractual Damages under ERISA*, at 28.

[35] *Vogel*, 692 F.Supp. 587.

[36] *Smith v. ABS Industries, Inc.*, 653 F.Supp. 94 (N.D. Ohio 1986)(punitive damages for willful violation); *accord*, *Haytcher v ABS Industries, Inc.*, _ F.Supp _____, 7 EBC 2158 (N.D. Ohio 1987) (willful violations), *rev'd on other grounds*, 889 F.2d 64 (6th Cir. 1989); *James A. Dooley Assoc. Emp. Ret. Plan v. Reynolds*, 654 F. Supp. 457 (E.D. Mo. 1987) (malicious breach of duty).

[37] *McRae*, No. 88-0544T, _____ F.Supp. _____ 11 EBC 2274 (D.C. S. Ala. 1989) (Relied on *Russell* concurring opinion to find $50,000 in extracontractual damages for delays in processing a

that is not a widely accepted conclusion[38] and even the *Vogel* and *McRae* district courts did not award punitive damages.[39] The 7th Circuit in *Lorenzen*, also recently stated that it also believes extracontractual remedies are available. [40] This is a U-turn for the 7th Circuit which held in 1987 that extracontractual damages were not available for common law claims.[41]

Ingersoll-Rand's decision to terminate McClendon was a willful act. As such, it clearly is capable of coming under the willful violation exception to ERISA under *Vogel*, *McRae* and the other decisions cited above. For this reason, the Texas Supreme Court decision should be affirmed.

3. *"Thou shalt deter!"* THE CONGRESSIONAL REACTION TO THE SIMULTANEOUS BROADENING OF ERISA PREEMPTION AND THE NARROWING OF ERISA REMEDIES.

P.L. 101-239, the *Omnibus Budget Reconciliation Act of 1989* was reported by the Conference Committee and published in the Congressional Record on November 21, 1989. The President signed OBRA 1989 into law on

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participant's claim for approximately $7,000 in unpaid medical services. Participant alleged extreme aggravation, humiliation and a ruined credit rating.).

[38] *See*, supra note 12 and note 25.

[39] *Vogel* , 692 F.Supp. 587, at 596; *McRae*, ___ F. Supp. _____, 11 EBC 2274, at 2279.

[40] *Lorenzen*, 896 F.2d 228, at 230.

[41] *Kleinhans*, 810 F.2d 618.

December 19, 1989. P.L. 101-239 amended ERISA §502 by adding subsection "(l)." Subsection "(l)" expanded the Department of Labor's enforcement authority by allowing the Secretary of Labor to assess a 20% civil penalty for ERISA violations.[42] On its surface there appears to be nothing directed at private ERISA enforcement actions.

It is in the Conference Committee's explanation of ERISA's enforcement policy that Congress takes the federal judiciary to task for failing to "*fashion legal* and equitable remedies that not only protect participants and beneficiaries but *deter violations of the law as well.*"[43] In the Kracov article on new developments in ERISA remedies, the author discussed the committee report of a 1988 bill which was not enacted.[44] That 1988 bill, the *"Miscellaneous ERISA Amendments Act of 1988"* rose from the dead to become part of OBRA 1989. After describing the DOL's lack of resources to fully *detect* and *deter* violations of ERISA, the OBRA 1989 conferees stated that private enforcement actions were essential to fill the gap:[45]

> For these reasons, it has become apparent that the Department must use its enforcement powers more vigorously to make the protection of ERISA meaningful. The conferees believe strengthened civil penalties will

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[42] P.L. 101-239, §2101.

[43] 135 Cong. Rec., *Conference Report on HR 3299, Omnibus Budget Reconciliation Act of 1989*, November 21, 1989, at H9454.

[44] Kracov *Extracontractual Damages under ERISA*, at 23-29.

[45] 135 Cong. Rec., November 21, 1989, at H9454 (*emphasis added*).

> better protect participants and beneficiaries. *The conferees further believe that the need for strengthened enforcement and deterrence of violations of ERISA applies not only to the Department of Labor, but to judicial oversight of private rights of action affecting employee benefit plans.* It remains the intent of Congress that the *courts* use their power of (sic) fashion *legal* and equitable remedies that not only protect participants and beneficiaries but *deter violations of the law as well.* The conferees expect that the executive agencies and the *courts* will use their substantial authority to achieve these goals and to safeguard the rights of plan participants.

Representative Clay, chairman of the Subcommittee on Labor-Management Relations of the House Education and Labor Committee in his extended floor comments stated that this portion of the Conference Committee's Report was aimed at the federal appellate courts overly expansive use of the Supreme Court dicta:[46]

> ... a growing body of Federal common law is developing. These efforts may have suffered an unexpected temporary setback with the Supreme Court's 1987 decision in *Pilot Life Insurance Company v. Dedeaux.* Many are concerned that the effect of this decision preempting State laws authorizing *punitive or other extracontractual damages* in connection with claims for benefits is effectively to deny them legal recourse.
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> ... Although the Court was correct to hold the State law in question was preempted, it incorrectly construed congressional intent with respect to the creation of a Federal common law of remedies...

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[46] 135 Cong. Rec., November 21, 1989, at H9603-04 (*emphasis added*).

As a practical matter, however, the effect of the decision is to undercut the ability of the courts *to deter willful or negligent misconduct*...

In authorizing the Federal courts to have the flexibility to structure the punishment to fit the violation, the fundamental wisdom of the framers of ERISA is apparent. Congress was right in 1974 to recognize that the courts, not the Congress, could best evaluate the facts and circumstances before them and create remedies that would not only *make participants whole* but also *deter future violations*.

...It is critical that the Secretary of Labor *as well* as *the courts* renew their efforts to safeguard the rights of plan participants *by vigilant and aggressive pursuit of violations and by using every tool they have to create a strong deterrent effect for the future*.

The OBRA 1989 Conference Report interpretation of the legislative history of ERISA's enforcement provisions is also in accord with numerous commentators who have written about *Russell* and *Pilot Life*. Such commentators have almost uniformly condemned the failure of the U. S. Supreme Court to properly balance ERISA policy objectives. Under *Pilot Life*, when a plan administrator unreasonably denies or delays a claim, the only additional cost it bears is the possibility that the plan will bear some portion of the aggrieved participant's legal costs. Because the plan administrator has an opportunity to reduce the participant's fee shift under ERISA §502(g)(1) through a hindsight determination of reasonableness, even the fee shifting statute will not adequately protect participants,[47] especially if the plan administrator's legal tactics contributed to the protracted litigation.[48]

The absence of monetary remedies, such as civil penalties, means a participant's plan interest is inadequately protected.[49] In *Curry v. Contract Fab.*, the plan administrator refused to furnish the pension claim form even after the participant engaged an attorney.[50] In *Kane* and *Anderson*, the plan administrator interpreted the plan to provide the promised benefit or coverage but when it came time to honor its prior interpretation, the plan administrator refused to do so, causing considerable (and probably otherwise noncompensable) injury to the aggrieved participants.[51]

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[47] A case can be made that the discretionary attorney fees award provision in ERISA §502(g)(1) as it currently is used by the courts does not provide a level playing field with respect to well-financed defendant's counsel. *See* Note, *ATTORNEY'S FEES UNDER ERISA: WHEN IS AN AWARD APPROPRIATE?* 71 Cornell L. Rev. 1037-1064, at 1062 (1986) and *generally*, Bartell, *Federal Court Awards of Attorneys' Fees*, II ALI-ABA Civil Practice and Litigation in Federal and State Courts, 1341-1382 (1985, 3rd ed.).

[48] *Leigh v. Engle*, , ____ F.2d __, 10 EBC 104, at 1049 (7th Cir. 1988), *Aff'g*, 669 F.Supp. 1390 (N.D. Ill. 1987) ("Because determination of exact fees incurred is well-nigh impossible ... and because the parties have evidenced an uncanny proclivity for (continued litigation)"); *See also*, *Krogh v. Chamberlain*, 708 F. Supp. 1235, (D.C. Utah 1989) (prevailing COBRA plaintiff denied attorney fees).

[49] *See supra*, note 12.

[50] *Curry v. Contract Fab. Inc. Profit Sharing Plan*, 891 F.2d 842, 844 (11th Cir. 1990) (claim form withheld for nine (9) months after "Curry got himself a lawyer" and for two (2) years before that).

[51] *Kane v. Aetna Life Ins.*, 893 F.2d 1283, at 1286 (11th Cir. 1990) (mental distress over denial of newly adopted child's health care

This especially true in ERISA welfare plans because delay in processing the participant's claim is often life-threatening. A belated and court ordered recognition that a course of treatment is covered by a health care plan is cold comfort to the family of the deceased.[52] In the absence of monetary civil penalties, for instance, all a denied COBRA participant obtains for himself is the right *to pay* for 18 more months of health plan coverage.[53]

This legislation was not slipped into the OBRA 1989 Conference Report in the dark of night by some anonymous staffer.[54] Instead it was a carefully thought out ERISA enforcement policy position of Congress. The House Education and Labor Committee had this policy statement

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coverage); *Anderson v. Pittsburgh-Des Moines Corp.*, 893 F.2d 638 (3rd Cir. 1990) (denial of promised pension).

[52] *Dozsa v. Crum & Forster Insurance Co.*, 716 F.Supp.131, (D.C. N.J. 1989) (cancer treatment known as autologous bone marrow transplant wrongfully refused); *McKinnon v. Blue Cross-Blue Shield of Alabama*, 691 F.Supp. 1314 (N.D. Ala. 1988) (lung cancer surgery claim wrongfully denied); *Vogel v. Independence Federal Sav. Bank*, 692 F.Supp. 587 (D. Md. 1988); *See also*, Appellant's principal brief motion to expedite decision, *Leiding v. Federal Deposit Insurance Corporation, appeal docketed*, No. 89-5078 (10th Cir. April 20, 1990) (participant cannot afford heart operation without COBRA coverage which administrator's prior plan interpretations said was available).

[53] ERISA §601-608 [29 USC §1161-1168].

[54] *Blanchard v. Bergeron*, 489 U.S. ____, 109 S.Ct. ____, 103 L.E.d.2d 67, at 78 (1989) (Justice Scalia, concurring opinion; criticizes letting anonymous Congressional staffers dictate the law of the land to the federal courts).

in gestation for two years[55] and, as Rep. Clay stated, it has been the subject of legislative hearings where interested parties had an opportunity to address the matter before OBRA 1989 was enacted.[56]

In addition, dissatisfaction with this Court's *Pilot Life* decision may be encouraging some courts to deliberately narrow the scope of the ERISA preemption provision in ERISA §514(a) when defining which employee plans are "employee benefit plans" under ERISA §3 [29 USC §1002]. Aggrieved participants then can seek extracontractual damages based on state common law claims because their employee benefit claims are not subject to preemption.[57] There is no "bright-line" minimal contact path to determine

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[55] Kracov *Extracontractual Damages under ERISA*, at 28-29.

[56] The use of the OBRA 1989 legislative oversight position would not be the first time the Courts have used a post-ERISA legislative oversight report to determine the meaning of the original enactment. The U. S. Supreme Court first did this in *Metropolitan v Massachusetts* when it used an oversight committee report to assist in ascertaining the intent of the original ERISA enactment. *See Metropolitan v Massachusetts*, 471 U.S. 724, at 747 n.25 (1985); *FMC v. Holliday*, 885 F.2d 79, at 88-89 (3rd Cir. 1989), *cert. granted*, No. 89-1048, ___ U.S. __ (1990).

[57] *Jordan*, 694 F.Supp. 822 (sharply criticizes the expansion of the preemption doctrine coupled with limitations on available remedies for fiduciary violations); *HealthAmerica*, 551 So.2d 235 (participant's fraud in the inducement claim against HMO plan was not preempted by ERISA. The Court did not consider the ERISA's disclosure rules, §§102-104, which may conflict with fraud claim, in substance and remedy).

which employee plans are subject to ERISA.[58] Therefore the lack of adequate remedies under federal common law may have the unintended side effect of undermining another important objective of ERISA, complete preemption of state law.

4. IMPLICATIONS OF *MAKING PARTICIPANTS WHOLE* AND *DETERRENCE* OR WHY A PER DIEM CIVIL PENALTY SHOULD BE THE MONETARY REMEDY OF CHOICE.

Making aggrieved participants whole and deterring others does not compelthe wholesale absorption of state common law, either for substantive rights or remedies for violations of those rights. ERISA §§2 and 3 state other objectives Congress had for ERISA. Therefore, if this Court decides that preemption is appropriate and rejects the *Amos* absorption doctrine or the *Vogel/McRae* willful violation exception to the *Pilot Life* dicta, this Court should consider some other alternative which restores the remedial balance that the *Pilot Life* dicta disturbed. This amicus brief proposes a monetary civil penalty proportional to the delay or denial period, a per diem penalty.

Per diem civil penalty for wrongful delay or denial of a valid claim. The *Pilot Life* Court stated that the federal courts must balance the competing interests of

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[58] *Lambert v. Pacific Mut. Life Ins. Co.*, 259 Cal. Rptr. 398 (Cal App 1 Dist. 1989) (application of criteria found in 29 CFR §2510.3-1(j)); *See also Hansen v. Blue Cross of California*, 891 F.2d 1384 (9th Cir. 1989) (extended discussion of preemption and group health care plans).

aggrieved participants against the burdens imposed on employers providing employee benefits.[59] This balancing act has not been repealed. Rather like the scholarly critics, Congress, in OBRA 1989, wants the federal courts to exercise greater flexibility in balancing than the federal courts thought was available after *Pilot Life*.

This amicus brief urges this Court, on any remand, to suggest to the Texas courts that they consider a per diem civil penalty under ERISA's federal common law. A per diem penalty should deter other violations of ERISA[60] while not unduly burdening employers who, in the real world, pay for it all.

Under OBRA 1989, the federal courts have the flexibility to resort to monetary civil penalties to induce private law enforcement and to compensate for noncompensable losses in addition to deterrence of others. The OBRA 1989 Conference Report stated that the Department of Labor's own resources have not kept pace with its responsibility to protect plan participants. Thus the Conference Committee called for "strengthened enforcement and deterrence of violations" in "*private rights of action* affecting employee benefit plans" in which the courts are to "*fashion legal* and equitable remedies."[61]

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[59] *Russell*, 473 U. S. 134, at 148; *Pilot Life*, 481 U.S. 41, at 54.

[60] The trial court's use of its injunctive powers should deter the named defendants.

[61] 135 Cong. Rec., November 21, 1989, at H9454 (col. 1).

Deterrence, especially a strong deterrence, should be necessary to prevent both intentional and inadvertent, but preventable, violations of ERISA.[62] In order to prevent unduly burdening the plan and its fiduciaries, a court should consider adopting the position of the 11th Circuit in *Curry v. Contract Fab. Inc.* In addition to equitable remedies for delay in processing plaintiff's claim, the 11th Circuit affirmed the award of a civil penalty that was "designed" to "teach ERISA fiduciaries a needed lesson".[63] Other courts have recently imposed civil monetary penalties as an alternative to an extracontractual or punitive damage remedy.[64] A per diem penalty functions in the same way as a liquidated damage clause functions in a contract, thus helping to make an aggrieved participant whole from an otherwise non-compensable procedural injury as well as deterring other procedural violations.[65]

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[62] *Paris v. Profit Sharing Plan for Employee of Howard B. Wolf, Inc.*, 637 F.2d 357 (5th Cir. 1981); *Wolfe v. J. C. Penney Co.*, 710 F.2d 388, at 394 (7th Cir. 1983); *Contra, Curry v. Contract Fab. Inc. Profit Sharing Plan*, 891 F.2d 842, 845 and 847 n.10 (11th Cir. 1990).

[63] *Curry*, 891 F.2d 842, 845 and 847 n.10 (monetary civil penalty awarded to plaintiff); *See also, Daniel v. Eaton Corp.*, 839 F.2d 263 (6th Cir. 1988), *cert. denied*, ____ U.S. __, 109 S. Ct. 76 (1989) (the lower court awarded plaintiff $25 per day for the 278 day delay in furnishing requested plan documents).

[64] *Vogel (II)*, 728 F.Supp 1210 (D. Md. 1990); *Sandlin v. Iron Workers Dist. Council Plan*, 716 F.Supp. 571 (N.D. Ala. 1988).

[65] For procedural defect, see *Wolfe v. J. C. Penney Co.*, 710 F.2d 388, at 394; *Grossmuller v. International Union, U.A.W.*, 511 F.Supp. 709 (1981); *Contra, Curry*, 891 F.2d 842, 845 and 847 n.10. For ERISA non-disclosure, see *Paris*, 637 F.2d 357;

If a per diem civil penalty is not the favored remedy, judicial criteria for determining the amount of an award of civil penalties or extracontractual damages will have to be developed by courts no longer bound by their perception of a restriction in *Pilot Life* on the development of common law remedies. Damages for mental distress and other noncompensable losses are hard to assess and thus are not predictable costs to employers.[66] The very unpredictability may discourage employers, in the aggregate, from setting up new plans.

In contrast, the authors of ERISA have already given their seal of approval to per diem civil penalties. ERISA §502(c)(1) [29 USC §1132(c)(1)] imposes a $100 per day penalty for failure to notify COBRA participants and for failure to furnish plan documents. The predictability and liquidated damage nature of a per diem penalty may make it attractive to courts trying to balance ERISA's other goals with corrective action needed for the case at hand. This may be especially true for a federal district court trying to balance the time demands of the new federal criminal

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Contra, Edwards v. State Farm Mut. Ins. Co., 851 F.2d 134, at 137 (6th Cir. 1988) (detrimental reliance and prejudice are not prerequisites to claim on misleading SPD); *See also Blau v. Del Monte*, 748 F.2d 1348, 1352-53 (9th Cir. 1984) (pattern of ERISA violations precluded a procedural remedy from being effective, so substantive remedy awarded).

[66] For instance, the April 30, 1990 National Law Journal reported at page 6 that the Kansas Supreme Court recently affirmed the award of $6.3 million for pain, suffering, and disability including "loss of enjoyment of life."

sentencing guidelines with its civil docket. A per diem civil penalty for the typical wrongful denial or delay in processing actions also avoids the often criticized unpredictability of punitive damage awards in insurance bad faith actions.[67]

IV. CONCLUSION

The Court should affirm the Texas Supreme Court either because there is no preemption by ERISA of McClendon's wrongful discharge claim or because the same result would occur under federal common law. Ingersoll-Rand did not suffer prejudice by the failure to preempt when the Court applies the reasoning of *Amos*, *Vogel*, and *McRae*.

Alternatively, rather than simply reversing if the Court disagrees with the reasoning of *Amos* on *absorption* of state law claims or *Vogel* and *McRae* on willful violations of ERISA, the Court should consider the extensive and

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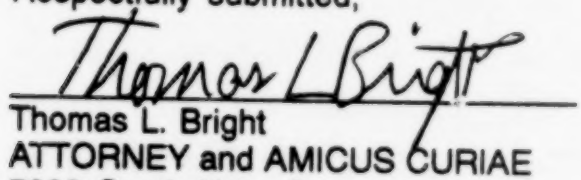
[67] Because this amicus brief urges this Court to favor monetary civil penalties determined on a per diem basis to restore balance to ERISA's remedy structure, the amicus brief does not need to address the increasing willingness of the courts to accept punitive damage awards. For a summary of the controversy over standards for punitive damage amounts, see the opposing viewpoints in: D. Sweetman, *License to do Evil?* Natl L. J., at 13-14 (November 6, 1989) and G. Crovitz, *Absurd Punitive Damages Also "Mock" Due Process*, Wall St. J., at A15 (March 14, 1990); *See also*, *Browning-Ferris v. Kelso Disposal*, 492 U.S. _____, 106 L.E.d.2d 219, at 239 (1989); *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So.2d 537, at 543-544 (Ala. S. Ct. 1989), *cert. granted*, No. 89-1279, _____ U.S. __, (April 2, 1990).

generally negative feedback its *Pilot Life* decision has received in the lower federal courts, in Congress, and in scholarly legal publications. The experience since *Pilot Life* demonstrates that plan participants are not adequately protected when *Pilot Life* is interpreted to stop the development of a federal common law of remedies for ERISA. *Pilot Life*, as applied by the federal appellate courts, does not protect plan participants nor deter similar violations of ERISA. This Court is not allowing ERISA to fulfil its most basic function.

To adequately protect aggrieved plan participants, the Court should consider some monetary civil penalty as a remedy which can be both easily administered by a trial court and is not unduly burdensome to employers. A per diem civil penalty like that of ERISA §502(c)(1) [29 USC §1132(c)(1)] meets these two criteria. A per diem penalty also provides deterrence to other potential violations of ERISA and restores the balance for protection of aggrieved plan participants, especially when there is only a unreasonable denial or delay in the processing of the participant's benefit. By stretching the existing statutory authority, some District Courts are already imposing monetary civil penalties for ERISA violations which once would have been thought suitable for extracontractual damages. The seal of approval from this Court on monetary civil penalties would also satisfy the Congressional concern for more *"vigilant and aggressive pursuit of violations."*

On remand, the Court should suggest that the Texas courts consider a per diem civil penalty if it preempts McClendon's state law claim and also rejects the reasoning of *Amos*, *Vogel*, and *McRae*.

Respectfully submitted,



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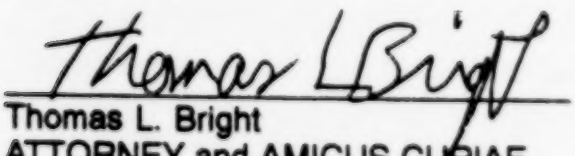

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY MCCLENDON,
Respondent.

On Writ of Certiorari to the Supreme Court of Texas

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

1. The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents nearly 180,000 businesses and organizations and serves as the principal voice of the American business community.

2. The California Employment Law Council ("the CELC") is a voluntary, nonprofit organization composed of more than 60 companies employing over 400,000 persons. Its members represent a broad segment of the employer community in California. The CELC was formed

to promote the common interests of employers and the public in fostering reasonable and equitable laws pertaining to employment practices.

3. The Amici's members have a vital interest in preserving the uniform and exclusive federal regulation of pension plans intended by Congress when it passed the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"). Our members have expended billions of dollars on pension plans governed by ERISA's intricate statutory scheme and employ thousands of individuals who stand to benefit from such plans. The threat to the interests of our members from the decision of the Supreme Court of Texas is national in scope. If states are allowed to recognize a "public policy" tort of wrongful discharge for interference with pension plan rights, the many thousands of employees across the country who are close to vesting in their pension rights and are terminated in the normal course of business will become potential state court tort plaintiffs. Our members who maintain ERISA plans thus will find themselves subject to a significant liability that did not exist when they decided to begin such plans—awards of compensatory and punitive damages under state law. Those of our members who have not yet established pension plans will be discouraged from doing so, precisely the result that Congress sought to avoid when it carefully defined the extent of employer liability under ERISA.

4. As part of ERISA's comprehensive federal regulation of virtually all aspects of employee benefit plans, Congress specifically prohibited the discharge of an employee for the purpose of interfering with the attainment of any right to which the employee may become entitled under a covered plan.[1] Congress also vested exclusive

[1] Section 510 of ERISA, 29 U.S.C. § 1140, provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the [employee benefit] plan.

jurisdiction over such claims in the federal courts, thereby precluding state adjudication.[2] Congress further provided that such claims could be remedied only through the entry of injunctive or other appropriate equitable relief,[3] a limitation that the decision below destroys by allowing awards of punitive and compensatory damages against employers.

5. These statutory provisions are part and parcel of Congress' broader purpose of replacing haphazard state regulation with a uniform set of national rules, and thereby to encourage the formation and maintenance of ERISA plans. It was for this reason that Congress broadly preempted any and all state laws "insofar as they may now or hereafter relate to" any covered benefit plan.[4] Our members deciding whether to create pension plans, and those who deal on a daily basis with the intricacies of maintaining such plans, thus have been

[2] Section 502(e) of ERISA, 29 U.S.C. § 1132(e), provides for exclusive federal jurisdiction over ERISA discharge claims as follows:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary.

[3] Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), provides for relief in ERISA discharge cases as follows:

> A civil action may be brought—
>
> . . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

[4] 29 U.S.C. § 1144(a).

guaranteed a defined, uniform, and exclusive set of national rules.

6. The ERISA remedial scheme thus embodies a delicate balance between the interests of employers, labor organizations and plan participants, undertaken by Congress with the full knowledge that the imposition of excessive costs upon employers would discourage the formation of new retirement plans. If the Court upholds the decision below, states will be able to unsettle this delicate balance, contrary to Congress' express desire to insulate pension plan regulation from precisely such state interference.

7. The public policy tort recognized by the decision below poses an especially daunting threat to the balance struck by Congress in ERISA. During the past decade, the proliferation of wrongful discharge claims proceeded at an astounding rate, subjecting employers to previously unrecognized causes of action. At least thirty-nine states now recognize a cause of action for wrongful discharge in violation of "public policy."[5] Thousands of such lawsuits have been filed across the country, resulting in six- and seven-figure awards for compensatory and punitive damages.[6] These state laws establish widely varying standards of employer conduct. The same employment decision lawful under federal and some state laws may be unlawful under other state laws, a situation especially difficult for multi-state employers. Compounding these problems, the proliferation of ERISA pension plans has created an even larger universe of potential state law

[5] *See* "Employment At Will State Rulings Chart," I.E.R.M. (BNA), at 505:51 (1989).

[6] One research firm has determined that the national average damage award in cases based on wrongful termination rose from $227,280 in 1986 to $311,332 in 1987. *See* Bacon, "See You In Court," Nation's Bus., July 1989, at 17. Columbia University professor Alan F. Westin has estimated that some 25,000 wrongful discharge cases were pending in federal and state courts in 1987. *See* "It's Getting Harder to Pass Out Pink Slips," Bus. Wk., March 28, 1988, at 68.

wrongful discharge plaintiffs who are about to vest in their pension rights.[7] If states are allowed to recognize the public policy tort created by the decision below, the proliferation of substantial and unpredictable awards for compensatory and punitive damages will discourage employers from establishing pension plans, precisely the result that Congress intended to avoid when it carefully devised ERISA's exclusive remedies.

Our members therefore have an obvious and growing interest in ensuring that the uniform and exclusive federal rules relating to employee pension plans remain free from state interference, and that congressional decisions regarding the liability of employers in connection with such plans be preserved from contrary state judgments.[8]

SUMMARY OF ARGUMENT

1. Reversal of the decision below is necessary to preserve ERISA's uniform and comprehensive statutory scheme from state interference. When it created ERISA's detailed and pervasive federal code regulating employee benefit plans, Congress determined that uniform and exclusive federal regulation of benefit plans was required. Congress therefore preempted all state laws relating to benefit plans in one of the clearest and broadest preemption provisions in federal law. The Court repeatedly has recognized, in a line of cases beginning with *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), that ERISA's broad express preemption provision was designed by Congress to ensure that an exclusive set of fed-

[7] According to the most recent Department of Labor data, employers in 1987 maintained some 872,000 private pension plans, covering 41.9 million workers. *See* Pension and Welfare Benefits Administration, U.S. Dept. of Labor, "Trends in Pensions" 13, Table 1.3 (1989).

[8] The parties have consented to the filing of this brief. Consent letters are on file with the Clerk of the Court.

eral rules governs the complex area of employee benefit plans.

2. This broad preemption provision, which explicitly states that the provisions of ERISA "supersede" any state laws "insofar as they may now or hereafter relate to" any covered benefit plan,[9] precludes Texas' effort to supplement federal remedies for a wrong specifically recognized in the text of ERISA. A state law with the express purpose of prohibiting interference with pension plan rights owes its very existence to the plan, and thus "relates to" a pension plan within the meaning of ERISA. Moreover, ERISA's prohibition of precisely the same conduct must "supersede" such a state law. While Congress created several detailed and specific exceptions to ERISA's broad express preemption provision, none of these exceptions even remotely sanctions a state law duplicating ERISA's protection of plan rights. Not only has Congress already protected the very rights that Texas seeks to vindicate by application of its state law; Congress also chose to provide only equitable relief for such violations, and to insulate such discharge claims from any state interference to the maximum extent possible by vesting exclusive jurdisdiction over ERISA discharge claims in the federal courts. The decision below conflicts with each of these explicit statutory provisions.

3. The Court repeatedly has read ERISA's broad preemption provision literally, and specifically has held that ERISA's detailed federal remedial scheme preempts state tort claims remediable through compensatory and punitive damages. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). A similar reading is required in this case. Congress carefully balanced protection of plan participants against the disincentives to plan formation that excessive employer liabilities would create—a balance critical to the success of the voluntary private pension system being created. By subjecting employers to addi-

[9] 29 U.S.C. § 1144(a).

tional state damages for maintaining federally-controlled pension plans, the decision below destroys this careful legislative balance.

4. It is no answer to say that Texas merely is adding a sanction to conduct already prohibited by federal law. The states are not free to determine that Congress has created insufficient remedies to vindicate federal interests, especially where, as here, the congressional choice of remedy serves as part of an integrated remedial scheme deliberately designed to balance the competing interests of employers and plan participants. In a line of cases exemplified by *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282 (1986), the Court uniformly has rejected the notion that the states are free to add sanctions where Congress has prohibited conduct under federal law and created an exclusive federal statutory remedy.

5. Normal ERISA preemption principles fully apply to cases involving the liabilities of employers. There is no statutory or logical basis for limiting ERISA's preemption provision to the rights and liabilities of plan administrators or fiduciaries. ERISA imposes many obligations and liabilities on employers who maintain benefit plans, and Congress nowhere even intimated that ERISA's broad preemption provision somehow was not meant to apply to these portions of the statute. Exclusion of employer liabilities from the reach of ERISA preemption would ignore completely Congress' pivotal concern that imposition of excessive liabilities upon employers would discourage the formation of voluntary benefit plans.

ARGUMENT

I. REVERSAL OF THE DECISION BELOW IS COMPELLED BY ERISA'S EXPLICIT STATUTORY LANGUAGE, AS INTERPRETED REPEATEDLY BY THE COURT.

A. The Decision Below Conflicts with ERISA's Express Statutory Language.

The decision below conflicts with ERISA's explicit and unequivocal preemption provision, designed by Congress as a fundamental and critically important part of ERISA's statutory scheme. ERISA's preemption provision is express and extremely broad in scope, providing that "the provisions of [ERISA] . . . *supersede any and all State laws* insofar as they may now or hereafter *relate to* any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a) (emphasis added). The Court repeatedly has struck down state attempts to infringe upon the exclusive sphere of federal regulation, recognizing the "expansive sweep of [ERISA's] preemption clause" giving it a "broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987).[10]

[10] As the Court recently noted, "when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *English v. General Electric Co.*, —— U.S. ——, 58 U.S.L.W. 4679, 4681 (June 4, 1990). Because this case involves a broad and express statutory preemption provision, it is fundamentally different from the *English* case, in which the Court, in the absence of any express preemption provision, was required to divine the congressional intent underlying various federal nuclear regulatory enactments and concluded that Congress preempted state power over nuclear energy only to the extent that the state action had a "direct and substantial effect" on the federal interest in radiological safety. *Id.*, at 4683. In ERISA, by contrast, Congress expressly preempted all state power to regulate employee benefit plans, and explicitly stated that the provisions of ERISA would supersede any state law that "relate[s] to" an employee benefit plan.

A state wrongful discharge claim designed to protect pension plan rights plainly has a "connection with or reference to" a pension plan; such a claim exists only because an ERISA plan exists. Congress itself recognized the obvious tie between such a discharge and an ERISA plan, because it specifically prohibited discharges interfering with *pension plan rights* in its comprehensive regulation of pension plans.[11] Indeed, if the cause of action judicially recognized by the Supreme Court of Texas instead was statutorily based, the state statute at issue would mimic (if not expand upon) Section 510's protection of pension plan rights. As a matter of both logic and express statutory language, ERISA therefore must preempt a state public policy tort seeking to protect *pension plan* rights that already are protected by federal law.

This conclusion is compelled as well by the language in ERISA's preemption provision to the effect that "*the provisions of this subchapter . . . supersede* any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (emphasis added). The narrowest possible reading of this preemption provision would accord preclusive effect to the express provisions of ERISA. Section 510's prohibition of interference with pension plan rights certainly is one of the "provisions of this subchapter," and thus the cause of action recognized by the state of Texas, which mirrors Section 510's prohibition, must be a state law that is superseded by ERISA.

Congress did create a number of specific and narrow exceptions to ERISA's express preemption provision, but

[11] The very language Congress used in this prohibition makes reference to a *pension plan*: "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under *the plan*." 29 U.S.C. § 1140 (emphasis added).

none of these is even arguably applicable to this case. The two principal exceptions clarify that the preemption provision should not "be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities" [12] and does not apply "to any generally applicable criminal law of a State." [13] No exception was created for state laws prohibiting discharges interfering with pension plan rights; no exception was created for state laws that impose liabilities on employers and not plan administrators or fiduciaries; and no exception was created for state laws that purport to vindicate the same interests protected by ERISA's federal scheme. This precise congressional specification of exceptions to ERISA's broad preemption provision indicates legislative intention that preemption apply in all other cases.

Indeed, not only did Congress preempt all state substantive law in ERISA; Congress additionally vested exclusive jurisdiction over ERISA claims in the federal

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[12] 29 U.S.C. § 1144(b)(2)(A). Congress did create a "proviso" to this exception in the so-called "deemer clause." *See* 29 U.S.C. § 1144(b)(2)(B). The rather complex nature of this provision/exception/deemer clause scheme demonstrates the care that Congress utilized in drafting ERISA's preemption provision.

[13] 29 U.S.C. § 1144(b)(4). The other five "exceptions" constitute both actual exceptions and rules of construction and may be summarized as follows: (1) Causes of action which arose, or any act or omission which occurred, before January 1, 1975, are not preempted. 29 U.S.C. § 1144(b)(1). (2) Nothing in the preemption provision prohibits use by the Secretary of Labor of the services or facilities of a State agency as permitted under § 506 of the Act. 29 U.S.C. § 1144(b)(3). (3) With certain exceptions, the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51) is not preempted. 29 U.S.C. § 1144(b)(5). (4) Certain specific exceptions are created for state insurance laws regulating reserves and contributions by certain multiple employer welfare benefit plans. 29 U.S.C. § 1144(b)(6). (5) Domestic relations orders are not affected by the preemption provision. 29 U.S.C. § 1144(b)(7).

courts,[14] even more clearly indicating its belief that uniform national regulation of pension plans was essential. Exclusive federal jurisdiction is manifestly unusual in our federal system, in which state and federal courts generally share concurrent jurisdiction over federal claims. *See, e.g., Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 508 (1962). *See also Yellow Freight System, Inc. v. Donnelly*, —— U.S. ——, 110 S. Ct. 1566 (1990); *Tafflin v. Levitt*, —— U.S. ——, 110 S. Ct. 792 (1990). In the recent *Yellow Freight* decision, the Court pointed to ERISA as one prime example of the unusual situation where Congress so clearly seeks to preclude state interference that it chooses to vest exclusive jurisdiction in the federal courts. 110 S. Ct., at 1569 n.3.[15]

Congress' unusual choice of an exclusive federal forum, as part of an enforcement scheme that insulates ERISA-related discharge claims from any substantive state interference, would be nullified if the decision below is allowed to stand. Any plaintiff could evade Congress' explicit choice of an exclusive federal forum (and its decision to allow only equitable relief) merely by labeling his

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[14] *See supra*, note 2.

[15] Not only did Congress vest exclusive jurisdiction over ERISA claims in the federal courts, but it preempted state law so completely that removal on the basis of an ERISA preemption defense is appropriate. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), the Court recognized that under the well-pleaded complaint rule, a preemption defense only supports removal where Congress has "so completely pre-empt[ed] a particular area, that any civil complaint raising this select group of claims is necessarily federal in character." *Id.*, at 63-64. In *Metropolitan Life Ins. Co.*, the Court held that Congress intended the preemptive force of ERISA's enforcement mechanisms in § 502 of the Act to be so complete that an ERISA preemption defense provides a sufficient basis for removal. *Id.*, at 66-67. Clearly, then, the decision below creating a state enforcement mechanism in an area already remediable under § 502 of ERISA must fall from ERISA's preemptive force.

or her discharge claim as a violation of state "public policy." [16] A state court that would not even have jurisdiction over the same claim, based upon exactly the same facts and exactly the same federal policy if pleaded under ERISA, would be empowered by artful pleading to award compensatory and punitive damages far in excess of the relief contemplated by Congress when it created ERISA. To avoid this anomalous result and protect Congress' explicit choice of an exclusive federal forum for ERISA discharge claims, the decision below should be reversed.

B. The Court Repeatedly Has Read ERISA's Preemption Provision as Broadly as the Language Itself Indicates.

The Court repeatedly has emphasized that ERISA's express statutory language, and its legislative history, demonstrate that Congress made a deliberate decision to "establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). As the Court explained in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987), "[t]he House and Senate sponsors emphasized both the breadth and importance of the pre-emption provisions." Indeed, in *Pilot Life Ins. Co.*, the Court quoted one sponsor of the act who characterized the "'reservation to Federal [authority of] the sole power to regulate the field of employee benefit plans' as ERISA's 'crowning achievement.'" *Id.* (quoting 120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent)).

ERISA's broad preemption provision replaced a much narrower proposed provision that Congress specifically rejected.[17] The Court recognized the importance of this

[16] As described by the English courts more than 150 years ago, public policy "is a very unruly horse, and . . . once you get astride it you never know where it will carry you." *Richardson v. Mellish*, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824).

[17] The provision, as passed by the Senate, preempted only state laws "insofar as they may now or hereafter relate to the subject

deliberate congressional choice of a broad preemption provision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983):

> The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA. [Footnote omitted.] The Conference Committee rejected these provisions in favor of the present language, and indicated that the section's preemptive scope was as broad as its language. *See* H.R. Conf. Rep. No. 93-1280, p. 383 (1974); S. Conf. Rep. No. 93-1090, p. 383 (1974).

By deliberately adopting the broad preemption provision ultimately enacted, Congress clearly intended to preclude state laws interfering with the enforcement mechanisms created in ERISA. Senator Williams, in a statement cited by the Court in *Pilot Life Ins. Co.*, made this abundantly clear during the floor debate on the final bill, stating:

> 'It should be stressed that with the narrow exceptions specified in the bill, the substantive and *enforcement provisions* of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or incon-

matters regulated by this Act. . . ." H.R. 2, 93d Cong., 2d Sess. § 699(a) (March 4, 1974), *reprinted in* 3 Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative History of the Employee Retirement Income Security Act of 1974 ("Leg. Hist.") 3599, 3820 (Comm. Print 1976). *See also* H.R. 2, 93d Cong., 2d Sess. § 514(a) (March 6, 1974), 3 Leg. Hist. 3898, 4057-58 (House version); S. Rep. No. 127, 93d Cong., 1st Sess. p. 47 (1973), 1 Leg. Hist. 587, 633; Amdt. No. 496 to S. 4, 93d Cong., 1st Sess. § 699(a) (Sept. 17, 1973), 1 Leg. Hist. 1271, 1494. The legislative history indicates that Congress specifically found this narrower preemption provision unacceptable. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 n.20 (1983) (quoting 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)).

> sistent State and local regulation of employee benefit plans.'

481 U.S., at 46 (quoting 120 Cong. Rec. 29933 (1974)) (emphasis added). Significantly, Senator Williams' statement followed immediately after a discussion of ERISA's prohibition against interference with plan rights. Indeed, the ERISA provisions protecting plan rights, vesting exclusive jurisdiction over such claims in the federal courts and making available a limited set of equitable remedies, *all* constitute ERISA "enforcement provisions." ERISA therefore must preempt the state public policy tort recognized by the decision below, which creates a state protection of ERISA plan rights enforceable in state court and remediable through compensatory and punitive damages.

Consistent with this conclusion, the Court has applied ERISA's preemption provision to the very congressional choice of remedies implicated in this case. In *Pilot Life Ins. Co.*, 481 U.S., at 47-48, the Court held that Section 514 of ERISA preempted three state tort claims—for tortious breach of contract, breach of fiduciary duties and fraud in the inducement—alleging a failure to provide benefits under a long term disability employee benefit insurance plan. In so holding, the Court explicitly emphasized that ERISA's comprehensive civil enforcement scheme "is one of the essential tools for accomplishing the stated purposes of ERISA" and functions as "the exclusive vehicle" for protecting ERISA rights. *Id.*, at 52. Leaving no doubt that states could not impose supplemental remedies relating to conduct prohibited by ERISA, the Court stated:

> [T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. *The policy choices reflected in the in-*

> *clusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.*

Id., at 54 (emphasis added).

The Court's decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), similarly recognizes the broad reach of ERISA's preemption provision. In *Alessi*, the Court held that ERISA preempted a New Jersey law prohibiting workers' compensation benefits from being used to offset pension benefits because the state law "relate[d] to" pension plans. *Id.*, at 522-23. Significantly, the state law preempted in *Alessi* at least served the legitimate state interest of regulating workers' compensation calculations. The wrongful discharge action recognized by the court below, by contrast, expressly vindicates the federal interest in protecting ERISA benefits, and thus even more closely "relate[s] to" pension benefits than the state law struck down in *Alessi*.

Indeed, in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), the Court struck down a state law even though it did not touch upon a prohibition specifically set forth in ERISA. The Court had "no difficulty in concluding that" ERISA preempted a New York Human Rights Law forbidding discrimination in employee benefit plans on the basis of pregnancy because it "'relate[s] to' employee benefit plans." *Id.*, at 96-100. Significantly, the sex discrimination prohibited by the New York law at issue in *Shaw* is not even specifically prohibited by ERISA, which contains no prohibition against sex discrimination in benefit plans. In this case the federal-state conflict is far clearer, because ERISA expressly prohibits discharge for the purpose of interfering with pension plan rights, provides a defined set of limited remedies, and vests the federal courts with exclusive jurisdiction over such claims.

C. A Similar Broad Reading of ERISA's Preemption Provision is Required in this Case to Protect Congressional Judgments About the Scope and Type of Remedies That Should be Available to Protect Plan Beneficiaries.

Congress specifically authorized federal courts to issue equitable as opposed to legal relief in most suits brought under ERISA by plan participants. *See* 29 U.S.C. § 1132 (a)(3). Congress did not arrive inadvertently at this choice of remedies; rather, it deliberately chose equitable relief as a fundamental part of ERISA's statutory scheme. As the Court observed in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985), an earlier version of ERISA would have authorized the entry of legal and equitable relief, but this language was eliminated when the Act passed. This congressional choice was deliberate and should have preclusive effect:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361, 100 S. Ct. 1723, 1726, 64 L.Ed.2d 354 (1980).

Id., at 146 (emphasis in original).

Congress' central purpose in limiting ERISA remedies was carefully to balance the protections afforded employees against the liabilities to which employers would expose themselves by deciding to form benefit plans. The success of our private pension system is largely dependent upon the employer's voluntary decision to maintain a private pension plan in the first instance. Congress knew

that imposition of excessive costs upon employers would discourage the formation of new retirement plans, as the Court recognized in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S., at 148 n.17, stating, "Congress was concerned lest the cost of federal standards discourage the growth of private pension plans." Senator Nelson emphasized the importance of this concern during floor debate on the bill that eventually was enacted:

> [Costs are] an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, . . . Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.

102 Cong. Rec. S15,762 (daily ed. Aug. 22, 1974), 3 Leg. Hist. 4800. *And see, infra*, at 23-24, and materials there cited.

The Court specifically has held that this policy choice requires preemption of state remedies in areas already addressed by ERISA's comprehensive and carefully balanced remedial scheme. In striking down the state laws at issue in *Pilot Life Ins. Co.*, 481 U.S., at 54, the Court recognized that ERISA's "comprehensive civil enforcement scheme . . . represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans" and that "[t]he deliberate care with which ERISA's civil enforcement remedies were drafted and *the balancing of policies embodied in its choice of remedies* argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." (Emphasis added.) This policy choice compels preemption in this case as well, where Texas seeks to add legal remedies to the equitable relief that ERISA already imposes upon employers who discharge employees for the purpose of interfering with plan rights.

II. THERE IS NO PRINCIPLED BASIS FOR LIMITING THE SCOPE OF ERISA PREEMPTION IN THIS CASE.

A. The Decision of the Court Below Is Simply Wrong Insofar as It Concludes That the States May Supplement Federal Remedies Because the State and Federal Laws Have Congruent Purposes.

According to the decision rendered by the Supreme Court of Texas, ERISA's express preemption provision does not preclude a wrongful discharge claim alleging interference with pension plan rights because the Respondent "is *not* seeking lost *pension benefits* but is instead seeking lost future wages, mental anguish and punitive damages as a result of the wrongful discharge." *McClendon v. Ingersoll-Rand Co.*, —— Tex. ——, 779 S.W.2d 69, 71 n.3 (1989) (emphasis in original). The proposition that there is no federal-state conflict whenever the state provides more expansive remedies in order to vindicate federal interests assumes that the same Congress that was far-sighted enough to create the important federal law in question was incompetent to ensure adequate protection of the federal rights it created, and that state judgments as to appropriate remedies should be substituted for congressional decisions as to how federal interests should be protected.[18]

The Court never has embraced such an illogical assumption. In fact, well-established precedent of the

[18] The manifest disregard for deliberate federal judgments revealed by the decision below is perhaps best appreciated by considering the constitutionality of a state statute expressly authorizing state courts to entertain ERISA discharge suits, and to award compensatory and punitive damages, justified by the state's conclusion that Congress had not gone far enough in protecting the rights of employees when it enacted ERISA. The unconstitutionality of such a law is manifest, and there is no meaningful distinction between the decision below and such a statute.

Court establishes that deliberate congressional creation of an exclusive federal remedy cannot be supplanted by the states. For example, in *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286-87 (1986), the Court rejected precisely the theory espoused by the court below: that a state statute was not preempted because it merely provided supplemental penalties for violations of federal law. The Court reasoned that " 'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity,' " *id.*, at 286 (quoting *Garner v. Teamsters*, 346 U.S. 485, 498-99 (1953)), and that the Wisconsin statute interfered with Congress' " integrated scheme of regulation' by adding a remedy to those prescribed by the NLRA," *id.*, at 287 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). The Court expressly rejected Wisconsin's argument that its "supplemental remedy" was "different in kind from those that may be ordered by the Board" because " 'to allow the State to grant a remedy . . . which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.' " *Id.* (quoting *Garmon*, 359 U.S., at 247).

Gould is only the most recent case in which the Court has held that even though a state law seeks to advance the purpose of the federal statute, it cannot survive preemption by an exclusive federal enforcement mechanism. For example, in *San Diego Building Trades Council v. Garmon*, 359 U.S., at 246-47, the Court held that a state could not provide tort damages for picketing prohibited by the NLRA, expressly rejecting the argument that preemption did not apply because California was attempting to supplement the injunctive relief that the NLRB might obtain:

> Even the States' *salutary effort* to redress private wrongs or grant compensation for past harm cannot

be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

Garmon, 359 U.S., at 247 (emphasis added).[19]

This basic preemption principle recently has been applied directly to a dispute involving the extent of ERISA preemption. In *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825 (1988), the Court held that ERISA preempts a Georgia statute that singled out ERISA welfare plan benefits for protective treatment under state garnishment procedures. The Court expressly rejected the argument that the state law was saved from preemption because it helped to effectuate ERISA's underlying purposes. Stating that "[l]egislative 'good intentions' do not save a state law that falls within the broad pre-emptive scope of § 514(a)," the Court held that ERISA "'displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements.'" *Id.*, at 829-30 (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985)).[20]

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[19] The supplemental remedies theory for avoiding federal preemption rests upon the mistaken assumption that preemption doctrine applies only to rights and not to remedies. This is not new, and never has been, the law. As the Court recognized in *Garner v. Teamsters*, 346 U.S. 485, 498 (1953), in holding that Pennsylvania could not extend its own form of relief to unlawful picketing governed by the NLRA, "[t]he conflict lies in remedies, not rights."

[20] ERISA thus is unlike the nuclear energy field, analyzed by the Court in *English v. General Electric Co.*, —— U.S. ——, 58 U.S.L.W. 4679 (June 4, 1990). The statutes there at issue did not reflect any "clear congressional intention," either through their express statutory language or legislative history, to make the federal remedial scheme exclusive or to bar additional state remedies. By contrast, the Court has held that under ERISA, "the detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected under ERISA." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S., at 54. Indeed, in contrast to the nuclear field—where a supplementary state tort claim would not serve to undercut any federal interest—in this case a supplementary state tort remedy would undercut the primary federal interest in plan formation and maintenance, which is the very reason that Congress created a limited set of federal remedies in the first instance.

The decision below therefore rests upon a discredited theory for avoiding preemption that repeatedly has been rejected by the Court and specifically has been rejected as applied to ERISA. Indeed, the decision below illustrates the danger posed by state attempts to supplement federal remedies that are part of a comprehensive federal enforcement scheme. By seeking to protect ERISA pension plan rights through compensatory and punitive damages, the Supreme Court of Texas has interfered with Congress' judgment regarding the appropriate balance of employer and plan participant interests. While the Supreme Court of Texas vindicates one federal interest in protecting pension plan rights, it defeats another. In so doing, it ignores the basic proposition that Congress is wholly competent not only to create federal rights, but to provide an exclusive statutory scheme for their vindication. When it has done so expressly, as it has in ERISA, state courts have no business deciding, under a "public policy" rationale, that congressional remedies are inadequate.

B. Employer Liabilities Fall Within ERISA's Preemption Provision.

Respondent's argument that ERISA preempts only state laws imposing obligations or liabilities upon plan administrators and fiduciaries, as opposed to employers,[21]

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[21] *See* Respondent's Brief in Response to Petitioner's Petition for a Writ of Certiorari to the Supreme Court of the United States, p. 12 ("ERISA preemption should be applied sparingly, if at all, in cases where the employer itself will have to pay the damages").

is entirely unavailing. This argument for selective and sporadic application of ERISA's preemption provision contradicts ERISA's language and fundamentally misunderstands the structure and content of ERISA's statutory scheme.

ERISA's broad express preemption provision contains no hint that it is meant to apply only to some portions of ERISA's statutory scheme. Absent strong evidence that Congress intended this anomalous result, selective application of a broad and express preemption provision is entirely unwarranted. There is nothing in ERISA's text or legislative history indicating that Congress intended to protect only plan administrators and fiduciaries from additional state liabilities and obligations. As discussed *supra*, ERISA's preemption provision applies by its very terms to Section 510 of the statute, which plainly is intended to impose liabilities on employers who (unlike plan administrators or fiduciaries) are the only entities in a position to discriminate against or discharge an employee.

A narrowly cabined approach to ERISA preemption also ignores ERISA's statutory scheme, which controls plan administrators, fiduciaries and employers alike. The numerous employer obligations imposed by ERISA are plainly part and parcel of ERISA's integrated regulatory scheme. While it is the employer who must decide to begin a pension plan and who determines the level of benefits—voluntary decisions outside of the law's scope—once the decision to create a plan has been made, ERISA imposes numerous specific obligations on the employer.[22] These employer obligations are part of the

[22] These obligations include minimum vesting and participation standards, *see* 29 U.S.C. §§ 1052 and 1053, as well as the levels of contribution that an employer must make to a plan, *see* 29 U.S.C. §§ 1082 and 1083. ERISA creates recordkeeping and reporting obligations for employers who decide to form pension plans. *See* 29 U.S.C. § 1059. Employers may be sued under Section 502 of the

careful balancing of the rights of plan beneficiaries, fiduciaries and employers undertaken by Congress when it passed ERISA, a balancing expressly premised on the need to avoid discouraging the establishment of pension plans. Indeed, in a private pension system where the ultimate decision to provide any benefits rests with the employer, a policy of clearly defined and carefully limited employer liabilities was fundamental to the success of the system.

Throughout its consideration of ERISA, Congress repeatedly emphasized the importance and ramifications of this policy choice. As the House Report stated, Congress was "constrained to recognize the voluntary nature of private" plans and accordingly weighed "[t]he relative improvements required by this Act . . . against the additional burdens to be placed on the system." H.R. Rep. No. 533, 93d Cong., 1st Sess. 1 (1973), 2 Leg. Hist. 2348. Senator Long explained the particular importance of carefully defined limited employer liabilities during the floor debate prior to final passage, stating:

> We who have worked intimately on this legislation have always kept in mind that private pension plans depend for their very existence on voluntary action. We know that new pension plans will not be adopted and that existing plans will not be expanded and liberalized if the costs are made overly burdensome, *particularly for employers* who generally foot most

Act. *See* 29 U.S.C. § 1132. Section 510, in addition to prohibting the type of discharge at issue in this case, prohibits employer retaliation against any individual who testifies in any inquiry or proceeding relating to ERISA. *See* 29 U.S.C. § 1140. Section 511 further prohibits employers from the use or threat of fraud, force or violence to intimidate a plan participant or beneficiary for the purpose of preventing or interfering with the exercise of his or her plan rights. *See* 29 U.S.C. § 1141. ERISA establishes employer liability for withdrawal from a plan as part of the many specific obligations and liabilities that it imposes upon employers. *See* 29 U.S.C. §§ 1362 through 1364.

> of the bill. This would be self-defeating and would hurt rather than help the employees for whose benefit the legislation is designed.

120 Cong. Rec. 29944-45 (1974), 3 Leg. Hist. 4778 (emphasis added).[23] Nothing in the text or legislative history of ERISA indicates that Congress intended to allow states to defeat this important congressional purpose by imposing additional liabilities upon employers, thereby adding to the disincentives to plan formation that Congress purposefully sought to limit.

We do not contend, of course, that ERISA preempts all state power with regard to employee benefits. In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the Court held that neither ERISA nor the NLRA preempted a Maine statute requiring employers to provide a one-time severance payment to employees in the event

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[23] *See also* 120 Cong. Rec. 4295 (1974), 2 Leg. Hist. 3415 ("since these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon employer willingness to establish or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer") (remarks of Rep. Ullman); 120 Cong. Rec. 29211 (1974), 3 Leg. Hist. 4706-4707 ("[I]t is necessary to remember that with the exception of certain collective bargaining agreements, pension plans are voluntarily set up by employers as an inducement to attract employees. In developing compromises in this area, both the committees and the conferees were necessarily cognizant of the need to encourage the continued existence of these plans. As a result, the conference report on H.R. 2 represents a true balance of the interests of all concerned.") (remarks of Rep. Rostenkowski); 120 Cong. Rec. 4308 (1974), 2 Leg. Hist. 3451 (Employers "do have some choice with respect to a voluntary pension plan, and while we had every desire to make it as splendid a set of protective requirements as we could, for the working people of this country, we had to be careful. If we overdid it, quite obviously we would have people writing us letters saying: 'How come you helped us so much that now we have no pension plan at all because our employer has decided he cannot afford it any longer under the new rules?'") (remarks of Rep. Conable).

of a plant closing. But the Maine statute at issue neither established nor required employers to maintain an employee benefit *plan* in order to provide these benefits. 482 U.S., at 6. For this reason, no *plan* was in the picture to trigger application of the ERISA preemption provision, which precludes any and all state laws relating to a benefit *plan*. *Id.*, at 7-8. Similarly, in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the Court held that ERISA's "deemer" clause allowed the State of Massachusetts to require minimum mental health coverage for all health insurance plans offered in the State. *Metropolitan Life Ins. Co.*, 471 U.S., at 739-47. Once again, however, there was no requirement that an employer offer any such benefits or maintain an ERISA plan to provide such benefits.

In neither case was a state attempting to impose additional liabilities upon employers who decide to create ERISA plans. Certainly it does not follow from *Fort Halifax* or *Metropolitan Life* that all state laws relating to ERISA benefit *plans* are outside of ERISA's preemption provision, merely because some state authority over employee benefits remains following ERISA. Unlike *Fort Halifax* and *Metropolitan Life*, which did not involve plan-linked benefits, this case involves alleged interference with a plan right that necessarily *does* arise from an ERISA pension plan. Moreover, ERISA specifically prohibits a discharge interfering with a pension plan right, and the presence of this express federal proscription stands in marked contrast to federal legislative silence regarding minimum benefit levels involved in *Fort Halifax* and *Metropolitan Life*. This case does involve a provision in ERISA that must serve to "supersede" a duplicative and contradictory state law.

III. THE DECISION BELOW POSES AN ESPECIALLY DAUNTING THREAT TO THE FEDERAL INTERESTS THAT CONGRESS SOUGHT TO PROTECT IN ERISA.

By exposing employers who voluntarily establish pension plans to substantial and unpredictable compensatory and punitive damage awards every time they discharge an employee who is close to vesting, the decision below significantly increases employer pension plan costs that Congress carefully sought to limit when it created ERISA. Faced with the prospects of increased and unpredictable compensatory and punitive damage liabilities, some employers undoubtedly will be discouraged from establishing new plans. Employers with existing plans may be unwilling or unable to increase contributions to their pension plans when confronted with a proliferation in pension plan liabilities, especially if they are required to accrue reserves against large damage awards that may arise in state court litigation. By increasing employer liabilities, and thereby discouraging plan development or enhancement, the decision below achieves precisely the result that Congress sought to avoid. Compounding this problem, standards for awards of compensatory and punitive damages are wildly unpredictable, creating precisely the types of uncertainties that a uniform and comprehensive federal scheme is designed to eliminate.

The recent proliferation of wrongful discharge claims only serves to heighten these concerns. The past decade has seen the steady erosion of the employment at will doctrine and an explosion of wrongful discharge claims alleging a violation of public policy. As matters now stand, at least thirty-nine states recognize a cause of action for wrongful discharge in violation of public policy.[24] Thousands of such claims have been filed across the country, seeking millions of dollars in compensatory

[24] *See supra*, note 5.

and punitive damages.[25] Large awards in wrongful discharge cases have become commonplace. By one estimate, average awards in successful California wrongful discharge actions run as high as $486,812.[26] Juries have awarded as much as $20 million to single individuals in wrongful discharge cases.[27] Thus, if the decision below is left undisturbed, thousands of employers who decided to create ERISA covered pension plans in reliance on ERISA's exclusive regulatory scheme will find themselves subject to dramatically increased liabilities for compensatory and punitive damages resulting from state wrongful discharge claims.

Compounding these problems still further, the number of individuals who are about to vest in their pension rights is ever increasing. Thousands of private pension plans have been created, and more and more employees vest in their rights each year.[28] Significantly, our population will soon undergo a demographic shift, causing an inevitable increase in the number of individuals at retirement age and placing strains on our pension system. The Pension Benefit Guaranty Corp. only recently released a study identifying the 50 companies with the largest gap between the amount of money they will need to meet their pension obligations and the amount of funds

[25] *See supra*, note 6.

[26] Jung & Harkness, "The Facts of Wrongful Discharge," 4 Lab. Law. 257, 260 (1988). Other estimates are even higher. An article appearing in the Los Angeles Times on July 31, 1988, stated that average jury awards in successful wrongful discharge cases in California stood at $1,469,327 in 1987. Bradsher, "Firms Ask that Workers Waive Job Security," L.A. Times, July 31, 1988, § 1, at 1, col. 2.

[27] Lopatka & Martin, "Developments in the Law of Wrongful Discharge," ABA Division for Professional Education, National Institute on Litigating Wrongful Discharge and Invasion of Privacy Claims, 13-14 (1986).

[28] *See supra*, note 7.

they have set aside for them. The shortfall for only these 50 companies totalled $14 billion dollars.[29] Unless the decision below is reversed, at the same time that pension plans are being put to stringent financial tests, thousands of employees who are about to vest in their pension rights will be able to bring tort claims for wrongful discharge seeking extensive compensatory and punitive damages. State public policy claims, alleging wrongful discharge for interference with pension plan rights, therefore constitute a potent threat to the statutory scheme that Congress carefully crafted so as not to stem the tide of pension formation. To protect this statutory scheme from substantial state interference, the decision below should be reversed and remanded.

CONCLUSION

The decision of the Supreme Court of Texas should be reversed and remanded.

Respectfully submitted,

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[29] *See* Swoboda, "A Spotlight on Pension Funding," Wash. Post, May 8, 1990, at C1, col. 2.

No. 89-1298

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY MCCLENDON,
Respondent.

On Writ of Certiorari to the Supreme Court of Texas

BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND TEXAS EMPLOYMENT LAW COUNCIL IN SUPPORT OF PETITIONER

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BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND TEXAS EMPLOYMENT LAW COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council ("EEAC") and Texas Employment Law Council ("TELC") respectfully submit this brief amici curiae in support of Petitioner. The written consents of all parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community.

The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its trade association members, are employers subject to various employment and labor laws, including the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* As employers, virtually all of EEAC's members and member constituencies maintain employee benefit plans for their employees over and above normal wages and salaries. Many of these plans are products of collective bargaining with employee representatives.

EEAC members conduct business in virtually all states, and many members themselves have operations in a multitude of states. As potential defendants to state tort suits charging discriminatory interference with rights under employee benefit plans, EEAC's members are interested in the extent to which ERISA pre-empts such claims.

EEAC has participated as amicus curiae in several cases involving ERISA pre-emption of state law, including several in this Court.[1] In addition,

[1] *Ingersoll-Rand Company v. McClendon* (No. 89-1298), *cert. granted*, 110 S.Ct. 1804 (April 16, 1990); *General Motors Corporation v. Wells* (No. 89-1067), *cert. denied*, 50 U.S.L.W. 3694 (U.S. April 30, 1990); *Shaw v. Delta Airlines*, 463 U.S. 85 (1983); *Nolan v. Otis Elevator Co.*, 505 A.2d 580 (N.J. 1986); *Brooklyn Union Gas Co. and American Airlines v. N.Y. Human Rights Appeal Board*, 359 N.E.2d 393 (N.Y. 1976).

EEAC has filed amicus curiae briefs with this Court in a number of other cases involving pre-emption of state suits by federal law.[2]

TELC is a voluntary, non-profit association organized to promote the common interest of employers and the general public in well-reasoned laws and regulations affecting all aspects of employment in the private sector. TELC is incorporated under Texas law and is not affiliated with any other business association, except that its membership consists of employers doing business in Texas. Organized in early 1984, TELC has approximately 50 members, representing a diverse group of significant industries throughout Texas. These include, among others, refining and petrochemical, banking, insurance, retail, high tech, forest products, and health care. TELC's member companies range in size from less than 200 employees to more than 50,000 employees. Its governing body is a Board of Directors composed of experts in the fields of human resources management and employment law. This combined experience gives the Council a depth of understanding of the practical and legal considerations relevant to the development of employment-related law. TELC briefed this case before the Supreme Court of Texas. Pet. App. 1a.[3]

Thus, the issues presented for review in this case are extremely important to the constituencies that

[2] *General Motors Corporation v. Wells, supra* n.1 (NLRA and § 301 LMRA pre-emption), *Caterpillar, Inc. v. Williams*, 479 U.S. 960 (1987) (§ 301 pre-emption); *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988) (§ 301 pre-emption).

[3] Citations to the Petitioner's Appendix are designated as Pet. App. ——.

EEAC and TELC represent. The court below held that a tort action under state law charging discriminatory discharge with the intent to interfere with pension rights, which is specifically prohibited by § 510 of ERISA, was not precluded by ERISA's broad pre-emption provision because the plaintiff sought lost wages, damages for mental anguish, and punitive damages, not lost pension benefits.

This conclusion directly contradicts the clear language of ERISA as well as consistent interpretations by this Court supported by clear legislative history establishing Congressional intent to pre-empt state law relating to employee benefit plans. Moreover, the decision of the Supreme Court of Texas undermines the uniformity of pension law that Congress sought to establish in enacting ERISA. Accordingly, the decision below significantly burdens the administration of employee benefit plans covered by ERISA, and subjects employers to varying provisions of state law, with the attendant inconsistencies in rules and policies, and exposes employers to tort damages not available under ERISA.

EEAC and TELC's interests in this case lie in their desire that the Congressional purpose in enacting ERISA, to "establish pension plan regulation as exclusively a federal concern," *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981), not be undermined by an unduly narrow interpretation of the ERISA pre-emption provision. Such an interpretation would allow persons in states that permit widely varied employment-related individual tort causes of action to resort to the state courts and state law to resolve disputes more properly addressed through application of uniform federal law. The decision of the Supreme Court of Texas below, which adopts a severely restrictive interpretation of ERISA

pre-emption and allows a state tort suit on a cause of action specifically provided by ERISA, creates substantial concern among the employer community regarding the scope of ERISA pre-emption in these cases.

Because of their significant experience, EEAC and TELC are uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally, as significance of this case to employers generally—matters which have not already been brought to the Court's attention by the parties.

STATEMENT OF THE CASE

Respondent Perry McClendon, who had been employed by Petitioner Ingersoll-Rand since August 1972, was discharged in November 1982 as part of a reduction-in-force. Pet. App. 1a-2a. At the time, McClendon believed that he needed four more months of service to qualify for a pension benefit, *id.* at 2a, but in fact his pension was vested. *Id.* at n.2.

McClendon brought a state tort suit against Ingersoll-Rand, claiming *inter alia* that Ingersoll-Rand had discharged him in order to avoid making contributions to his pension fund. Pet. App. 1a.[4] The trial court granted summary judgment for the employer, and the Texas Court of Appeals affirmed. *Id.* The Court of Appeals recognized that McClendon "incorrectly concluded that being discharged before ten years of service would prevent him from collecting certain benefits" and that "[h]e was in fact never

[4] McClendon also alleged causes of action based on an alleged employment contract, an implied covenant of good faith and fair dealing, and intentional infliction of emotional distress. Pet. App. 17a.

denied those benefits." Pet. App. 24a. Thus, the Court of Appeals held, "Ingersoll-Rand did nothing more than react to an economic downturn by reducing its sales force. Such conduct is in no way actionable." *Id.*

The Supreme Court of Texas reversed. Finding a state public policy interest in protecting employee pension rights, the court created an exception to the employment-at-will doctrine in Texas, allowing a cause of action where an employee proves that he was discharged to avoid payment of pension benefits. Pet. App. 5a.

The court's public policy finding was based in part on the existence of § 510 of the Employee Retirement Income Security Act, 29 U.S.C. § 1140, which prohibits discrimination against employees for the purpose of interference with their pension rights. Pet. App. 5a. While recognizing that such cases have been held to be pre-empted by ERISA, the court asserted that this case was distinguishable because McClendon sought tort damages, not pension benefits. *Id.* at n.3.

Justice Cook filed a strong dissent in which Chief Justice Phillips and Justice Hecht joined. Pet. App. 6a-13a. Agreeing with the majority that "ERISA demonstrates the great significance attached to income security for retirement," Justice Cook went on to recognize that § 510 is *so* significant that it "confers upon employees a federal version of the cause of action created by this court, confines litigation of the federal cause of action to the federal courts, and pre-empts the state cause of action." Pet. App. 6a.

Justice Gonzalez, who also dissented, joined Justice Cook's conclusion that ERISA pre-empts McClendon's cause of action. *Id.* at 13a. He also observed that the majority's reliance on two decisions of the U.S. District Court for the Eastern District of New York was

"misplaced," since both the Northern District of New York and a New York court of appeals had refused to follow them. *Id.* at 15a.

SUMMARY OF ARGUMENT

The Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, establishes federal standards and requirements relating to the administration of employee benefit plans. In an effort to strengthen minimum vesting standards, Congress added § 510, which prohibits discrimination against employees for the purpose of interfering with the attainment of rights under an employee benefit plan. Section 510 provides a civil cause of action to an employee who is the victim of such discrimination.

To emphasize that pension plan regulation is exclusively federal in nature, and to eliminate inconsistent state and local restrictions, Congress included a broad pre-emption provision. Pursuant to § 514, ERISA's provisions pre-empt "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). Thus, any State law having a "connection with or reference to" an employee benefit plan, including common law developed through court decision, is pre-empted by ERISA. *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 46 (1987).

Since § 510 provides a cause of action protecting employees from discharge intended to interfere with attainment of rights under an employee benefit plan, and because ERISA broadly pre-empts state common law that relates to such plans, numerous federal and state courts have held that state law claims which mirror § 510 are pre-empted by ERISA. In contrast to this great wealth of authority, the court

below concluded that such an action could be maintained in state court under state law.

The court below reasoned that ERISA pre-emption was inapplicable because the plaintiff sought tort damages rather than pension benefits. Since Congress specifically chose to supersede state causes of action as well as any state remedies that might be available, with an exclusively federal remedy, a claim for state tort damages cannot overcome ERISA's complete pre-emption of state laws that "relate to" employee benefit plans.

The decision of the Supreme Court of Texas seriously erodes the uniform federal system of employee benefit regulation that Congress sought to establish in enacting ERISA. Moreover, the holding below seriously burdens the numerous employers who voluntarily maintain employee benefit plans, many of which operate in more than one state. The Texas Supreme Court's decision would allow the application of both federal and state requirements to employee benefit plans, causing substantial confusion.

In addition, exposure to diverse state and local laws and regulations will hinder the maintenance of uniform benefit plans by multistate employers, requiring them to choose between administering costly individual plans in each state and eliminating benefits that conflict with the requirements of a particular jurisdiction. These concerns formed the basis for ERISA's intentionally broad pre-emption provision, and have influenced this Court in numerous decisions recognizing the exclusively federal nature of claims related to benefit plans.

Since the decision below contravenes the clear statutory language of ERISA as well as the sound policy which underlies that language, it must be reversed.

ARGUMENT

I. ERISA PRE-EMPTS STATE TORT SUITS FOR DISCHARGE FOR INTERFERENCE WITH ATTAINMENT OF EMPLOYEE BENEFITS

A. Because ERISA Provides a Cause of Action for Interference with Attainment of Employee Benefits, It Pre-empts State Tort Suits for the Same Wrong

1. *ERISA Provides a Cause of Action for Discharge for Interference with Attainment of Employee Benefits*

The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 84, 90 (1983). "The statute imposes participation, funding, and vesting requirements on pension plans. It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans." *Id.* at 90-91 (citations omitted).

Recognizing that minimum vesting standards may be insufficient to protect employee benefits because employees could be discharged before their benefits were vested,[5] Congress provided specific protection

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[5] During hearings, Senator Hartke stated, "No vesting formula will produce real employee protection so long as employers are free to fire employees to defeat pension eligibility. Unfortunately, the Senate Labor Committee studies document many such occurrences. No statutory protection exists to prevent such action." Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974, P.L. 93-406, 1774 (Comm. Print 1976).

against this possibility. Section 510 of ERISA provides in pertinent part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefit] plan . . . . The provisions of Section 1132 of this title [relating to civil enforcement] shall be applicable in the enforcement of this section.

29 U.S.C. § 1140.[6] Thus, § 510 prohibits an employer from discharging an employee in order to avoid payment of benefits, and creates a civil cause of action in favor of such employee. *See, e.g., Cox v. Keystone Carbon Co.*, 861 F.2d 390, 391-2 (3d Cir. 1988) (§ 510 prevents employers from discharging employees to keep them from obtaining plan benefits, and authorizes a civil action).[7]

[6] Similarly, § 511 prohibits coercive interference with the exercise of rights under an ERISA plan. 29 U.S.C. § 1141. Describing § 610, which became § 510, and § 611, which became § 511, the Senate Report states, "These provisions were added by the Committee in the face of evidence that in some plans a worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions or violent reprisals. Although the instances of these occurrences are relatively small in number, the Committee has concluded that safeguards are required to preclude this type of abuse from being carried out and in order to completely secure the rights and expectations brought into being by this landmark reform legislation." S. Rep. No. 93-127, 93d Cong., 2d Sess., *reprinted* in 1974 U.S. Code Cong. & Admin. News 4838, 4872.

[7] *See also Dister v. The Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988); *Gavalik v. Continental Can Company*, 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987) (burden of proof in a civil action under § 510).

2. *ERISA's Language and This Court's Decisions Mandate Pre-emption of State Tort Suits "Related To" Employee Benefit Plans, Including Those Which Parallel ERISA § 510*

ERISA contains broad language pre-empting state action relating to employee benefit plans:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter *shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan* described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

Section 514, 29 U.S.C. § 1144(a) (emphasis added).[8] ERISA's pre-emption provision is "virtually unique," *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust For Southern California*, 463 U.S. 1, 24 n.26 (1983), and of "unparalleled breadth." *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1147 (4th Cir. 1985), *aff'd sub nom. Brooks v. Burlington Industries, Inc.*, 477 U.S. 901 (1986). As this Court has observed, Section 514 is "deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life Insurance Company v.*

[8] Subsection (b) generally excepts from ERISA pre-emption (1) causes of action occurring before January 1, 1975, (2) state laws regulating insurance, banking and securities, (3) use of the services or facilities of a State, (4) state criminal laws, (5) the Hawaii Prepaid Health Care Act, (6) certain state laws regulating some multiple employer welfare arrangements and (7) qualified domestic relations orders, none of which are relevant here. 29 U.S.C. § 1003(b) exempts from ERISA coverage governmental and church plans as well as plans maintained solely to comply with workmen's compensation or unemployment compensation laws, and likewise is not relevant here.

Dedeaux, 481 U.S. 41, 46 (1987), quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981).

This Court's decision in *Pilot Life* contains a thorough discussion of the legislative history supporting broad interpretation of § 514. 481 U.S. at 46. Congress rejected a pre-emption clause "applicable only to state laws relating to the specific subjects covered by ERISA . . . in favor of" the present broad language. *Id.*, quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 98. Moreover:

> The House and Senate sponsors emphasized both the breadth and importance of the pre-emption provisions. Representative Dent described the "reservation to Federal authority the sole power to regulate the field of employee benefit plans" as ERISA's "crowning achievement." 120 Cong. Rec. 29197 (1974). Senator Williams said:
>
> > "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." *Id.* at 29933.
>
> See also *Shaw v. Delta Air Lines, Inc.*, *supra*, at 99-100, n.20, (describing remarks of Senator Javits).

481 U.S. at 46. Thus, this Court has recognized that Congress intended the ERISA pre-emption provision to be extremely broad.

A state tort action for wrongful discharge for the purpose of interfering with attainment of pension benefits "relates to" a benefit plan, as required for ERISA pre-emption. In *Pilot Life*, this Court reaffirmed prior decisions in which "[t]he phrase 'relate to' was given its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Pilot Life*, 481 U.S. at 47, quoting *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985), quoting *Shaw v. Delta Air Lines*, 463 U.S. at 97.

ERISA pre-emption is not limited to state laws directly regulating employee benefit plans. On the contrary, "ERISA makes clear that even *indirect* state action bearing on private pensions may encroach upon the area of exclusive federal concern." *Alessi*, 451 U.S. at 525 (emphasis added). State common law creating a cause of action parallel to one provided by § 510 of ERISA has precisely this effect, regardless of whether the remedies are co-existent with those available under § 510 or are in the nature of tort damages.[9]

Indeed, a claim for wrongful discharge with the intent to interfere with the attainment of benefits has more than a mere "connection with or reference to" a benefit plan; it relies on the benefit plan for its very

---

[9] State judicial decisions as well as legislative pronouncements are pre-empted, since § 514 of ERISA defines "state law" to "include all laws, *decisions*, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1) (emphasis added). *See also Pilot Life Insurance Company v. Dedeaux*, 481 U.S. at 48 n.1 (state decisional law included within definition of "state law" under § 514).

existence. The Supreme Court of Texas described the law it created as follows: "This exception [to the employment-at will doctrine] allows recovery when the plaintiff proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying *benefits under the employee's pension fund.*" Pet. App. 5a (emphasis added). Thus, no plaintiff can recover under this new Texas tort without demonstrating the existence of and interference with rights to benefits under a benefit plan. Accordingly, the Texas cause of action "relates to" Ingersoll-Rand's benefit plan. *Fitzgerald v. Codex Corporation*, 882 F.2d 586, 588 (1st Cir. 1989) (claim for wrongful discharge to interfere with benefits "relates to" ERISA-covered benefit plan).

When the succinct formula used by this Court in *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. 58 (1987), is applied, it is clear that the state law action under scrutiny here is pre-empted by ERISA. Like *Pilot Life*, *Taylor*, which was decided on the same day, involved common law claims for improper processing of a benefit claim.[10] This Court quickly established that such claims were pre-empted, as follows:

> Under our decision in *Pilot Life Ins. Co. v. Dedeaux*, . . . Taylor's common law contract and tort claims are pre-empted by ERISA. This lawsuit "relate[s] to [an] employee benefit plan." . . . It is based upon common law of general application that is not a law regulating insurance. . . . Accordingly, the suit is pre-empted by § 514(a) and is not saved by § 514(b)(2)(A).

[10] *Taylor* held that "complaints filed in state courts purporting to plead . . . state common law causes of action [for improper processing of benefits] are removable to federal court" because they are "displaced by ERISA's civil enforcement provision." 481 U.S. at 60.

481 U.S. at 62 (citations omitted). Like the common law claims in *Pilot Life* and *Taylor*, the state law cause of action created by the court below relates to an employee benefit plan, is based on common law, and falls directly under an ERISA provision providing an exclusively federal cause of action. Thus, McClendon's state law claim, which mirrors a claim under § 510 of ERISA, is pre-empted by § 514. *Sorosky v. Burroughs Corporation*, 826 F.2d 794 (9th Cir. 1987).[11]

3. *Federal and State Courts Have Held that ERISA Pre-empts State Tort Suits for Interference With Pension Benefits*

Accordingly, in direct contrast to the decision below, several courts have held that ERISA pre-empts a state tort suit in which an employer is alleged to have discharged a worker to avoid paying benefits. In *Sorosky, supra*, an employee claimed wrongful dis-

[11] The few cases that have held to the contrary lack merit. As Justice Gonzales aptly noted in his dissent below, "the [Texas Supreme] court's reliance upon two federal district court cases, *Hovey v. Lutheran Medical Center*, 516 F. Supp. 554 (E.D.N.Y. 1981) and *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D.N.Y. 1980), is misplaced" because subsequent decisions of federal and state courts in New York have refused to follow them. Pet. App. 15a-16a. In *K Mart Corp. v. Ponsock*, 732 P.2d 1364 (Nev. 1987), where a jury award for compensatory and punitive damages for breach of an implied covenant of good faith and fair dealing based upon an employee's claim that he was terminated to avoid payment of pension benefits was upheld, the court did not address the issue of ERISA pre-emption.

charge on a number of theories, including an allegation that his employer discharged him in an attempt to avoid paying him monthly retirement benefits. 826 F.2d at 800. The Ninth Circuit ruled that ERISA pre-empted the wrongful discharge claim "to the extent that . . . [it] refers to the employee benefit plan." *Id.* Likewise, the Supreme Court of Appeals of West Virginia, the highest court in that State, has upheld a grant of summary judgment in favor of an employer based on ERISA pre-emption when an employee claimed that he was discharged to prevent vesting of his pension rights. *Conaway v. Eastern Associated Coal Corporation*, 358 S.E.2d 423 (W. Va. 1986). The Iowa Court of Appeals has reached the same conclusion. *Coontz v. Gordon Jewelry Corporation*, 439 N.W. 2d 223 (Iowa Ct. App. 1989) (to the extent that wrongful discharge claim included charge that employee may have been fired to prevent receipt of pension benefits, as distinguished from other wrongful discharge theories, it relates to employee benefit plan and is pre-empted by ERISA).

In addition, numerous federal district courts have reached the same conclusion and rejected state tort claims parallel to ERISA § 510. In *Harvey v. I.T.W. Inc.*, 672 F. Supp. 973 (W.D. Ky. 1987), a former employee based his claim of discharge in violation of public policy on the policy expressed in § 510, as did the Texas Supreme Court below. The court granted summary judgment on the grounds of ERISA pre-emption.

In a similar case, the U.S. District Court for the District of Maryland held that ERISA pre-empted a plaintiff's claim that her employer intentionally discharged her to prevent her retirement benefits from vesting. *Pratt v. Delta Air Lines, Inc.*, 675 F. Supp.

991 (D. Md. 1987). The court specifically rejected the plaintiff's argument, like that adopted by the court below, that the suit was not pre-empted because it involved a claim for damages other than retirement benefits. 675 F. Supp. at 998-99.[12]

4. *Similarly, Courts Have Found ERISA Pre-emption Of Other State Law Claims Within the Scope of ERISA § 510*

In harmony with the numerous decisions holding that state suits alleging discharge to interfere with

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[12] *See also Middleton v. Hewlett Packard Company*, 715 F. Supp. 988, 989 (D.Colo. 1989) (claim alleging constructive discharge to interfere with ERISA benefits pre-empted); *Treadwell v. John Hancock Mutual Life Insurance Company*, 666 F. Supp. 278, 282-283 (D. Mass. 1987) (state law wrongful termination claim comparable to that provided by § 510 pre-empted by ERISA); *Adams v. Catalyst Research, A Division of Mine Safety Appliances Co., Inc.*, 659 F. Supp. 163, 164-65 (D. Md. 1987) (claim for discharge to cause forfeiture of pension rights pre-empted); *Miner v. International Typographical Union Negotiated Pension Plan*, 601 F. Supp. 1390, 1394 (D. Colo. 1985) (state law claims redundant of ERISA claims pre-empted); *Baker v. Kaiser Aluminum and Chemical Corporation*, 608 F. Supp. 1315, 1318 (N.D.Cal. 1984) (claim of wrongful discharge to deny maximum pension benefits pre-empted); *King v. James River-Pepperell, Inc.*, 593 F. Supp. 1344, 1346 (D. Mass. 1984) (action "nearly identical" to those prohibited by ERISA pre-empted); *Delisi v. United Parcel Service, Inc.*, 580 F. Supp. 1572, 1575-76 (W.D. Pa. 1984) (claim of wrongful discharge to deprive plaintiff of disability benefits pre-empted); *Kelly v. International Business Machines Corporation*, 573 F. Supp. 366, 371 (E.D. Pa. 1983), *aff'd without opinion*, 746 F.2d 1467 (3d Cir. 1984) (state claim addressing the "same type of wrong prohibited by" § 510 pre-empted); *Gordon v. Matthew Bender & Company, Inc.*, 562 F. Supp. 1286, 1294 (N.D. Ill. 1983) (ERISA § 510 already provides a remedy for employee dicharged shortly before vesting date, thus claim pre-empted).

pension benefits are pre-empted by ERISA, several courts have held that similar suits concerning interference with other benefits are pre-empted as well. In *Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir. 1989), the First Circuit concluded that a claim that an employee was discharged to avoid having to pay health benefits for his wife was pre-empted by ERISA since the claim "related to" an employee benefit plan and § 510 creates a cause of action under ERISA addressing this type of claim. *Id.* at 588.[13] The Eighth Circuit reached a similar conclusion in *Dependahl v. Falstaff Brewing Corporation*, 653 F.2d 1208 (8th Cir.) *cert. denied*, 454 U.S. 968 and 1084 (1981), holding that common law claims of tortious interference with severance pay and life insurance plans are pre-empted by ERISA. *Id.* at 1216.

B. Because the Instant Action Falls Within § 510, It Is Pre-empted by ERISA Regardless of the Remedy Sought

Respondent's claim, for wrongful discharge with the intent of interfering with the attainment of his pension benefits, falls squarely within the scope of § 510 and thus could, and should have been brought under ERISA. Under ERISA's broad pre-emption provision, Respondent's state tort claim is superseded by federal law. *Sorosky v. Burroughs Corporation*, 826 F.2d 794.

The court below attempted to distinguish the wealth of authority supporting ERISA pre-emption

[13] *See also Folz v. Marriott Corporation*, 594 F. Supp. 1007 (W.D. Mo. 1984) (state tort claim for discharge to eject plaintiff from self-funded medical benefits plans pre-empted by ERISA).

by suggesting that "here the plaintiff acknowledged in his brief to the court of appeals that he is *not* seeking lost *pension benefits* but is instead seeking future wages, mental anguish and punitive damages as a result of the wrongful discharge." Pet. App. 5a n.3 (emphasis in original). This distinction does not suffice.

There is no basis whatsoever for suggesting that the application of ERISA pre-emption is dependent upon the type of remedy sought. The statutory language pre-empts "any and all State laws" without any such restriction. § 514. "[T]he crucial inquiry is not the purpose of the action; rather, its relation to an ERISA pension plan is determinative." *Authier v. Ginsberg*, 757 F.2d 796, 800 (6th Cir.), *cert. denied*, 474 U.S. 888 (1985).

Moreover, the existence of a cause of action under ERISA conclusively establishes pre-emption, regardless of whether additional remedies would be available in an identical cause of action under state law. In *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41 (1987), this Court considered whether ERISA pre-empted state common law tort and contract claims regarding improper processing of benefit claims. *Id.* at 43. Agreeing with the Solicitor General's argument that:

> Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits, and that varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress[,]

481 U.S. at 52, the Court ruled that such claims are pre-empted by ERISA and specifically rejected the concept of separate state remedies for the same wrong, stating:

> The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. . . The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.

Pilot Life, 481 U.S. at 54. Thus, as *Pilot Life* reflects, the case for pre-emption of state laws that mirror rights guaranteed by ERISA but provide remedies not available under the federal statute is even *stronger* than where the state remedies are co-extensive with ERISA.

Like claims for improper processing of benefits, claims of discriminatory discharge for the purpose of interference with pension benefits are specifically provided with a cause of action under ERISA, implemented by the civil enforcement scheme of § 502. 29 U.S.C. § 1140. Thus, under the rationale of *Pilot Life*, state laws that mirror ERISA § 510 are likewise pre-empted regardless of the nature of the remedies they provide, and the decision below directly conflicts with that rationale. *See Sorosky v. Burroughs Corporation*, 826 F.2d at 800 (wrongful discharge claim pre-empted even if § 510 provides less than remedy sought). *Cf. Perry v. P.I.E. Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3528 (U.S. February 20, 1990) (state law claim for breach of fiduciary duty pre-empted because ERISA provides a specific remedy); *Lee v. E.I. DuPont de Nemours and Co.*, 12 Employee Benefits Cases (BNA) 1081 (5th Cir. 1990) (state law fraud and misrepresentation claims pre-empted even though ERISA provides no remedy for harm alleged).

The inapposite distinction articulated by the court below was specifically rejected by a federal district court in *Pratt v. Delta Air Lines*, 675 F. Supp. 991 (D. Md. 1987). There, as here, in a state law tort action for emotional distress, mental anguish and punitive damages allegedly resulting from being discharged with the intent of interfering with her retirement benefits, the plaintiff argued that ERISA pre-emption was inapplicable because the suit was for damages, not merely benefits. Relying on *Pilot Life*, the court found the state tort claim pre-empted.[14]

The court below attempted to circumvent ERISA pre-emption by characterizing the claim as one for damages rather than benefits. This stratagem clearly seeks to "avoid[] through form the substance of the pre-emption provision." *Alessi*, 451 U.S. at 525. As this Court has already rejected the concept that additional state law remedies are available for ERISA-protected rights, Respondent's claim for additional remedies, used by the court below to avoid

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[14] *But see Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989) (while state law suit for discharge intending to interfere with attainment of pension benefits was pre-empted by ERISA, state law claim for intentional infliction of emotional distress regarding the manner in which discharge was handled was not).

ERISA pre-emption, is clearly irrelevant. *Cf. Authier v. Ginsberg*, 757 F.2d 796 (6th Cir. 1985) (suit by fiduciary for discharge in violation of public policy pre-empted as "related to" employee benefit plan although no lost benefits claimed).

II. THE DECISION BELOW, BY ALLOWING A STATE TORT SUIT ON A CLAIM GOVERNED BY ERISA, UNDERMINES THE CONSISTENT SYSTEM OF PENSION REGULATION ESTABLISHED BY CONGRESS IN ERISA AND SERIOUSLY BURDENS THE VAST NUMBER OF EMPLOYERS WHO MAINTAIN EMPLOYEE BENEFIT PLANS

A. The Decision Below Seriously Undermines the Uniform System of Pension Regulation Congress Intended To Establish with ERISA

As noted above, § 514 of ERISA was "meant to establish pension plan regulation as exclusively a federal concern." *Alessi*, 451 U.S. at 523. Explaining ERISA's broad pre-emption provision, Senator Javits stated that "the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs." 120 Cong. Rec. 29942 (1974) (remarks of Senator Javits). Instead of a plethora of conflicting state laws, ERISA's sponsors anticipated that with broad pre-emption of state regulation, "a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." *Id.* Accordingly, "[t]he pre-emption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." *Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. at 739.[15]

The decision below, by allowing a state cause of action covering the same conduct as § 510 of ERISA, seriously undermines the uniform federal regulation of benefit plans that Congress intended to establish. It allows the state of Texas, and any other state that follows suit, to superimpose its own concept of appropriate regulation on the federal scheme. For example, in addition to adding remedies beyond those which Congress provided (and which have been held to be exclusive), the Texas Supreme Court presumably would be free in future cases to develop substantive and procedural common law governing the new tort that it has created. Such state rules might differ significantly from federal common law related to § 510 on such important subjects as mode and burden of proof, applicable statute of limitations, availability of jury trials, and others. Such inconsistencies could result, *inter alia*, in different substantive standards between federal and state law for determining whether a violation of § 510 or its state law counterpart had occurred. This kind of inconsistent regulation is exactly what Congress intended to preclude. As this Court has recognized:

> The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop, indeed, the entire comparison of ERISA's § 502(a) to § 301 of the LMRA would make little sense if the remedies available to ERISA participants and beneficiaries under

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[15] *See also Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825, 830 (1988) ("Legislative 'good intentions' do not save a state law within the broad pre-emptive scope of § 514(a).").

> § 502(a) could be supplemented or supplanted by varying state laws.

Pilot Life, 481 US. at 56. The decision below indeed frustrates the expectations of Congress.

B. The Decision Below, by Allowing a State Tort Action That Mirrors ERISA § 510, Seriously Burdens Employers Who Maintain Employee Benefit Plans

This Court already has recognized the serious problem that would be created by the imposition of varying state laws on employee benefit plans. Holding that ERISA pre-empted a state human rights law prohibiting practices permitted by federal law, the Court observed that:

> An employer with employees in many States might find that the most efficient way to provide benefits to those employees is through a single employee benefit plan. Obligating the employer to satisfy the varied and perhaps conflicting requirements of particular state fair employment laws, as well as the requirements of Title VII, would make administration of a uniform nationwide plan more difficult.

Shaw v. Delta Air Lines, Inc., 463 U.S. at 105 n.25. The Court recognized that employers in this position would have to administer separate plans in each State, offsetting the cost of the increased administrative burden by lowering benefit levels, or adapt the uniform plan by eliminating classes of benefits. *Id.* The Court concluded, "ERISA's comprehensive preemption of state law was meant to minimize this sort of interference with the administration of employee benefit plans." *Id.*

In enacting ERISA, Congress recognized the inherent difficulties in allowing state regulation of bene-

fit plans, and thus adopted § 514 to "eliminat[e] the threat of conflicting or inconsistent State and local regulation of employee benefit plans." 120 Cong. Rec. 29933 (1974) (remarks of Senator Williams). As the Court agreed with the Solicitor General in *Pilot Life*, "varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress." 481 U.S. at 52.

These concerns are real. Of the 21.3 million full-time employees of medium-sized and large private firms in 1986, ninety percent participated in pension plans and had employer-sponsored health insurance. Employee Benefit Research Institute, Questions and Answers About Employee Benefits, EBRI Issue Brief No. 89 at 1 (April 1989). A substantial number of companies, including EEAC and TELC's members, are multistate employers, many of whom do business in all fifty states. Any erosion of ERISA's pre-emption provision will subject employee benefit plans to burdensome and costly state and local regulation, will severely hamper their efforts to maintain uniform and equitable benefits for their workforces, and will infringe on their ability to engage in free collective bargaining on benefits with unions representing their employees.

CONCLUSION

For the foregoing reasons, EEAC and TELC respectfully submit that the decision of the Supreme Court of Texas should be reversed.

Respectfully submitted,

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INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY McCLENDON
Respondent.

On Writ of Certiorari to the Supreme Court of Texas

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 ("ERISA") preempts a state common law claim that an employer has unlawfully discharged an employee in order to interfere with his attainment of benefits under an ERISA-covered benefit plan.

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IN THE
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INGERSOLL-RAND COMPANY,
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Respondent.

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 125,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of time to advancing the interests of the free enterprise system, and the economic and civil liberties of individuals and businesses. To this end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in cases affecting business. *See, e.g., Pacific Mutual Life Ins. Co. v. Haslip*, No. 89-1279 (decision pending 1990);

Kansas and Missouri v. Utilicorp United Inc., No. 88-2109 (decision pending 1990); *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893 (1989); and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986).

In addition to its interest in issues affecting the free enterprise system, WLF devotes a substantial amount of time to issues relating to the proper interrelationship between the national and state governments. WLF believes that both the national and state governments have important roles to play in our federal system of government. WLF has appeared as *amicus curiae* before this Court on a number of occasions recently to urge that state and local governments be granted greater autonomy in their dealings with the national government. *See, e.g., Howlett v. Rose*, ___ U.S. ___ (June 11, 1990); *Pennsylvania Department of Public Welfare v. Davenport*, 58 U.S.L.W. 4610 (May 29, 1990); *United States v. Spallone*, 110 S.Ct. 625 (1990). Nontheless, WLF believes that there are some policy matters that require uniform treatment nationwide and thus should be delegated exclusively to the national government.

WLF believes that regulation of employee benefits issues is, in light of the nationwide character of many corporate employers, one policy matter that should be handled by the national government to the exclusion of state and local governments. WLF believes that the confusion that would be engendered by permitting each of the 50 states and the District of Columbia to adopt its own set of employee benefits regulations would be a significant deterrent to the creation and maintenance of employee benefit plans.

WLF is filing this brief because of its interest in promoting the efficient working of the free enterprise

system and the welfare of the consuming public. Because WLF advocates maintaining a meaningful role for states in our federal system of government but at the same time advocates an exclusive role for the national government in the issues raised by this case, WLF believes that it can provide the Court with a unique perspective that may be of assistance to the Court in resolving this matter.

WLF submits this brief on behalf of Petitioner with the written consent of both parties.

STATEMENT OF THE CASE

WLF is, in the interest of brevity, omitting any detailed statement of the facts of this case. WLF adopts by reference the statement of facts contained in Petitioner's brief.

In brief, Respondent Perry McClendon worked as a salesperson and distributor of construction equipment for Petitioner Ingersoll-Rand Co. more or less continuously between 1972 and 1982. Ingersoll-Rand suffered a severe slowdown in its business in 1982; as a result, it terminated Mr. McClendon's employment in the fall of 1982 as part of a company-wide reduction-in-force.

Mr. McClendon concluded that at the time he was terminated, he was four months shy of vesting under Ingersoll-Rand's pension plan; he further concluded that he had been terminated for the express purpose of preventing him from becoming vested. Accordingly, he filed suit against Ingersoll-Rand in Texas state court, asserting a state-law wrongful termination claim. The lawsuit sought as remedies lost commissions, lost pen-

sion and other benefits, damages for emotional distress, and punitive damages.[1]

The trial court granted summary judgment to Ingersoll-Rand, and the court of appeals affirmed. However, in a 5-4 decision the Texas Supreme Court reversed and remanded. *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69 (Tex. 1989). It recognized that "Texas courts have traditionally followed the employment-at-will doctrine which allows that employment for an indefinite term may be ended at will and without cause." Pet. App. 3a. Nonetheless, the court announced (for the first time) that a cause of action lies under Texas common law against an employer whose "principal reason" for terminating an employee is to avoid contributing to or paying benefits under the employee's pension fund. *Id.* at 5a. The court further concluded that § 514 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144, does not preempt such a state common-law cause of action. *Id.* at 5a n.3. The court remanded the case for trial. This Court granted a writ of *certiorari* to consider whether Mr. McClendon's state common-law cause of action is preempted by ERISA.

SUMMARY OF ARGUMENT

A fair reading of § 514 of ERISA makes clear that Congress intended to preempt state laws of the type that Respondent is attempting to invoke in this case. Petitioner's thorough analysis in its brief of ERISA's language and legislative history convincingly makes the argument for preemption.

[1] In fact, Ingersoll-Rand asserts that Mr. McClendon was fully vested under the pension plan at the time of his termination. Accordingly, Ingersoll-Rand has never contested Mr. McClendon's claim to pension benefit entitlement. However, all damage claims other than Mr. McClendon's claim for pension benefits are still at issue in this case.

Rather than repeating those arguments in full in this brief, WLF focuses instead on a discussion of the proper roles of national and state governments in our federal system of government. An appropriate view of federalism recognizes that both national and state governments have important roles to play. Experience has taught that certain matters are best left to the control of state government; given the centuries-old nature of that experience, the Court will not lightly find that Congress (the final arbiter of the extent of the states' role in governing) has decided to divest the states of such control. On the other hand, experience has also taught that other matters are best left to the control of the national government. Indeed, 18th-century Americans learned very quickly (through their experiences under the Articles of Confederation) the disadvantages of overly decentralized authority. Based on that experience, the Framers of the Constitution carved out significant areas in which the national government was to play the dominant or exclusive role. Accordingly, the Framers could not accurately be described as hostile to the idea of federal preemption.

In light of that history, a generalized antipathy toward federal preemption of state law is unwarranted. While the Court has wisely been cautious in finding federal preemption of state laws affecting matters traditionally regulated by state government, there is no reason to resist a finding of federal preemption in matters (as here) having no such tradition. Texas has had no history of regulating employee benefits plans; indeed, the state common-law cause of action now before the Court was recognized for the first time by the Texas Supreme Court in this very case.

This Court has repeatedly recognized, in past decisions involving ERISA, Congress' intent to broadly preempt any and all state laws that "relate to" an employee benefit plan. By any common sense definition, the Texas common-law cause of action being asserted by Respondent clearly "relate[s] to" Petitioner's employee benefit plan. In the absence of any "federalism" concerns cautioning against preemption, the Court should not hesitate to find preemption in this case.

ARGUMENT

I. A FINDING OF PREEMPTION IN THIS CASE IS CONSISTENT WITH A PROPER VIEW OF THE RELATIONSHIP BETWEEN STATE AND NATIONAL GOVERNMENTS

State governments unquestionably have an important role to play in our federal system of government. Nonetheless, there can be no dispute that ultimately -- under the Supremacy Clause, U.S. Const., art. VI, cl. 2 -- it is for the national government to decide just how large a role the states are to play in any given issue. The national government is free to go so far as to preempt all state jurisdiction over an issue, so long as its actions are consistent with the Tenth Amendment.

Whether the national government has preempted all state jurisdiction over a given issue "fundamentally is a question of congressional intent." *English v. General Electric Co.*, ___ U.S. ___, 58 U.S.L.W. 4679, 4681 (June 4, 1990); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988). In practice this Court often has had great difficulty in discerning that intent, particularly when Congress has not made known its intent through explicit statutory language. Accordingly, the Court has

often resorted to various presumptions to assist itself in discerning Congressional intent. For example, in *California v. ARC America Corp.*, 109 S.Ct. 1661, 1665 (1989), the Court said that in light of the long tradition of state regulation of monopolies and unfair business practices, it would presume that Congress had not intended to preempt such regulation in the absence of "clear" evidence to the contrary.

Such presumptions against preemption are entirely appropriate in cases involving areas of the law with a long tradition of state government involvement. It is appropriate for the Court to presume that Congress is aware of the extent of such involvement and would not intend to upset *sub silento* the existing "federal-state balance" to such a great degree. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). *Cf. Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16-17 (1981)(in interpreting a federal statute, there is a presumption that Congress will not implicitly impose massive financial obligations on the states).

However, there is no logical basis for the presumption espoused by Respondent: that "preemption of state law by a federal statute is not favored in the absence of persuasive reasons."[2] Respondent's Brief in Response to Petition for Writ of Certiorari at 10. Indeed, the historical record suggests that such a sweeping presumption is wholly unwarranted; the Framers of the

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[2] Respondent bases his assertion on *dicta* from two Court decisions: *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981); and *Florida Lime & Avocado Growers, Inc. v. Pall*, 373 U.S. 132, 142 (1963). Neither case explains why federal preemption of state law should as a general proposition be disfavored. Recent Court decisions dealing with federal preemption issues have displayed no similar antipathy to federal preemption.

Constitution, rather than looking with disfavor on federal preemption of state laws, recognized that under our federal system of government there were certain fields that could be regulated most appropriately by the national government on an exclusive basis.

A. The Framers of the Constitution Intended That Both the State and National Governments Should Play a Significant Role in Our Federal System of Government, and Recognized That Exclusive Control by the National Government Was Wholly Appropriate in Certain Areas

The American experience in the years preceding ratification of the U.S. Constitution demonstrated to the Framers the need to assign a strong role to the national government in our federal system. The 1781 Articles of Confederation gave the individual states primacy in any state-national government conflicts. Article II of the Articles of Confederation stated, "Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

Many leaders of the era -- both inside and outside the Confederation government -- perceived the Confederation as flawed. The Confederation was beset with three major problems, none of which it was able to deal with effectively: stagnation and depression in parts of the country; the threat of debt and paper money to a sound financial structure; and diplomatic interference from abroad. C. Rossiter, *1787: The Grand Convention*, 42-47 (1987). Moreover, the national government was unable to deal with conflicts that arose among the states in the areas of commerce and finance. A. McLaughlin,

The Confederation and the Constitution, 1783-1789, 53-107 (1905). On the eve of the 1787 constitutional convention, James Madison described the flaws in the Confederation as follows:

> the want of authy. in Congs. to regulate Commerce had produced in foreign nations particularly G.B. a monopolizing policy injurious to the trade of the United States and destructive to their navigation. [The] same want of a general power over Commerce led to an exercise of this power separately, by the States, which not only proved abortive, but engendered rival, conflicting and angry regulation.

M. Ferrand, *The Records of the Federal Convention*, vol. 3 at 547.

The 1787 convention, which proposed ratification of a new constitution, was by and large a victory for those who viewed a strong national government as a solution to the problems that had plagued the Confederation, albeit advocates of strong state governments won some concessions. Rossiter at 263-65. Article I, Section 8 enumerated a long list of specific powers delegated to the new national government. Among those provisions were several that made clear that Congress was to exercise certain powers to the exclusion of state governments. Most prominently, Clause 3 granted to Congress power to "regulate commerce with foreign nations, and among the several States." Congress was also granted exclusive power to establish uniform naturalization and bankruptcy laws (Clause 4), to coin money and to fix standards of weights and measures (Clause 5), to declare war (Clause 11), and to raise an army and navy (Clauses 12 and 13). Moreover, Article I, Section 10 prohibited the states from entering into

any treaty, alliance, or confederation; coining money; emitting bills of credit; and (without the consent of Congress) laying duties on exports or imports, keeping troops or warships in peacetime, engaging in war, and entering into any agreement or compact with another state.

The Constitution as ratified also granted to Congress several open-ended powers that ensured the national government's supreme position in the federal system. Article I, Section 8, Clause 18 granted to Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution" the powers vested in the national government by the Constitution. Most importantly, Article VI, Clause 2 made the Constitution, laws adopted by Congress pursuant to the Constitution, and treaties "the supreme Law of the Land." Advocates of strong state governments were able to win the adoption of the Tenth Amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[3]

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[3] WLF does not mean to minimize the importance of the role of states in our federal system. Even Alexander Hamilton, a supporter of a strong national government, stated:

> [T]he state governments would clearly retain all the rights of sovereignty which they before had, and which were not by that act, *exclusively* delegated to the United States.

Hamilton, *The Federalist*, No. 32 (emphasis in original). But Hamilton's statement is nonetheless strong evidence that the Founding Fathers understood that the national government was to exercise sole authority over certain subject matters.

Thus, the idea that Congress would legislate over particular subject matters -- particularly in the areas of interstate commerce and foreign affairs -- to the exclusion of state governments was not at all foreign to the Founding Fathers. There is simply no reason to presume that Congress, when it is legislating in areas other than those traditionally subject to state regulation, does not intend to preempt state laws covering those same areas. Rather, the question of congressional intent should be decided solely by reference to the language of Congress' enactments.

B. Given the Absence of Previous Texas Regulation of Employee Benefit Plans, There Is No Reason To Apply Any Presumption Against Preemption in This Case

As noted above, it is entirely appropriate for the Court to apply rebuttable presumptions against Congressional intent to preempt state law in cases involving areas of the law with a long tradition of state government involvement. But no such tradition surrounds the Texas law at issue in this case.

Respondent seeks to impose liability on Petitioner based on a state common-law cause of action that prohibits an employer from discharging an employee in order to avoid contributing to or paying benefits under the employee's pension fund. Respondent, however, is unable to cite to any history of judicial regulation of such conduct by employers, for one simple reason: the Texas Supreme Court did not first recognize the cause of action in question until this very case. Indeed, the Texas court cited the adoption of ERISA as demonstrating the importance of pension benefits and thereby justifying its recognition of the new cause of action. Pet. App. 5a. It cannot seriously be contended that

Texas' regulation of this subject matter preceded adoption of ERISA's preemption provisions, given that ERISA itself is cited as one basis for that regulation.

Nor can Respondent contend that Texas has a long tradition of regulating employee discharges. Texas' tradition has been one of minimal involvement in that subject matter. As the Texas Supreme Court recognized in this case, "Texas courts have traditionally followed the employment-at-will doctrine which allows that employment for an indefinite term may be ended at will and without cause." *Id.* at 3a.

In summary, the Court need not be guided in this case by concerns that a federal preemption finding will unduly interfere with states' perogatives in an area traditionally subject to state government regulation. Rather, the Court's search for congressional intent should focus solely on the language of the preemption provisions of ERISA. *See Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985).

C. Congress Intended, in Adopting ERISA, to Preempt State Laws Such as That Applied by Texas in This Case

An appropriate respect for our federal system of government includes a recognition that once Congress has expressed its intent to preempt state laws in a particular field, it must prevail -- regardless how strongly a state may feel about enforcement of its laws. *Fidelity Federal Savings and Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 153 (1982). Congress may express its intent to preempt state law explicitly through explicit statutory language. Or it may express that intent implicitly -- either by establishing a regulatory scheme so pervasive that it can be said to occupy the

field, or by establishing a scheme that directly conflicts with state law. *English v. General Electric Co.*, 58 U.S.L.W. at 4681.

In adopting ERISA, Congress made explicit its intent to preempt state laws such as that at issue in this case. ERISA contains an explicit, broadly worded preemption provision:

> Except as provided in subsection (b) of this section [not applicable to this case], the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...

ERISA § 514(a), 29 U.S.C. § 1144(a). This Court has repeatedly given an expansive reading to § 514(a), finding that it conveys Congress' intent to "establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). The Court has given the phrase "relate to" in § 514(a) "its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985), *quoting Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).

In light of Petitioner's exhaustive consideration of § 514 in its brief, WLF will not revisit issues raised in that brief. Nonetheless, WLF wishes to make several observations relevant to the Court's determination of § 514's applicability in this case.

1. ERISA itself creates a federal cause of action applicable to the allegations raised by Respondent in

this case. *See* ERISA § 510, 29 U.S.C. § 1140 ("It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . ."). It follows that if Congress thought it appropriate to include within ERISA a prohibition against discharging employees for the purpose of interfering with the employee's attainment of pension rights, Congress believed that such actions "relate to" employee benefit plans. Accordingly, it is difficult to comprehend how, as asserted by Respondent, a state law prohibiting identical conduct does not similarly "relate to" employee benefit plans within the meaning of ERISA § 514.

2. The Court has made clear that it will not preempt all state laws that have any effect on a preempted federal field, without regard to the size of the effect. Rather, no preemption will be found where the effect is "remote" and "tangential." *English v. General Electric Co.*, 58 U.S.L.W. at 4683. However, the Texas law at issue in this case cannot escape preemption under that standard, because its effects on employee benefit plans is substantial.

For example, the Texas cause of action exposes employers who maintain such plans to huge punitive damage claims, a type of claim not available in a suit brought under § 510 of ERISA. The introduction of new remedies against employers alleged to have discharged employees in order to prevent the vesting of pension rights has a significant impact on the enforcement scheme set forth in ERISA. As this Court noted in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 1556 (1987), "the detailed provisions of § 502(a) [of ERISA, which creates a cause of action for

violations of § 510] set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans."[4] To permit Texas to impose a new cause of action and new remedies against employers found to have violated § 510 would upset the "careful balancing" undertaken by ERISA. It is quite plausible to envision employers declining to create new employee benefit plans or dissolving existing plans to avoid facing the potential liabilities created under Texas law. Such results run counter to Congress' design to encourage the formation of employee benefit plans.

3. This Court has not hesitated in the past to find ERISA preemption of state laws regulating the discharge of employees. In *Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542 (1987), the Court held that an employee's suit filed in state court alleging, among other things, wrongful termination in violation of state law for the purpose of avoiding liability under a disability

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[4] Accordingly, the Court in *Pilot Life* held that state law causes of action based on allegedly improper processing of pension benefit claims were preempted by ERISA. The Court said:

> The expectations [of Congress] that a federal common law of rights and obligations undeer ERISA-regulated plans would develop, indeed, the entire comparison of ERISA's § 502(a) to § 301 of the [Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), under which a federal common law of labor relations has developed] would make little sense if the remedies available to ERISA participants under § 502(a) could be supplemented or supplanted by varying state laws.

Pilot Life Ins. Co., 107 S.Ct. at 1558.

insurance contract was properly removable to federal court. The Court found that the state-law wrongful termination claim was preempted by ERISA and held that where Congress has so completely preempted a particular area of the law, any civil complaint raising claims in that area "is necessarily federal in character" and thus removable to federal court. *Id.* at 1546.

4. In arguing against preemption in this case, Respondent relies on *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211 (1987). Respondent's Brief in Response to Petition for Writ of Certiorari at 8, 14. That reliance is misplaced. In *Fort Halifax*, the Court noted that ERISA § 514 preempts state laws relating to "employee benefit plans," not those (as in *Fort Halifax*) relating merely to "employee benefits." The Court held that a Maine law requiring employers closing plants to provide severance pay to its employees related merely to "employee benefits" and not to "employee benefit plans" because the employer in question had no plan providing for severance benefits and was not required by the Maine law to establish such a plan unless and until it closed its plant. *Id.*, 107 S.Ct. at 2218. The facts of this case are not at all comparable to those in *Fort Halifax*. Petitioner quite clearly has in place an "employee benefits plan," and Respondent's suit is based on his claim that he was discharged based on Petitioner's desire to avoid payments to Respondent under that plan. Accordingly, the distinction drawn in *Fort Halifax* between "employee benefits" and "employee benefit plans" has no relevance to this suit.

CONCLUSION

The Texas law at issue in this case is clearly preempted by the express language of ERISA. Considerations of federalism do not counsel against a finding

of preemption in this case. Moreover, permitting Texas to give effect to its common-law cause of action in this case would undermine the careful balance struck by ERISA and thereby undermine ERISA's goal of encouraging the formation and retention of employee benefit plans.

Accordingly, WLF respectfully requests that the judgment of the Texas Supreme Court be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

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Petitioner,

v.

PERRY MCCLENDON,
Respondent.

On Writ of Certiorari to the Supreme Court of Texas

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QUESTION PRESENTED

Whether Section 514 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144, preempts a state common law wrongful discharge suit in which the plaintiff claims that his employer discharged him to prevent the vesting of his pension rights.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and organizations throughout the United States; they have a compelling interest in legal issues that affect state and local governments.

This case concerns petitioner's contention that Section 514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), supersedes a state wrong-

ful discharge action in a case where the plaintiff alleges that the defendant terminated his employment to preclude the vesting of his pension benefits. This contention has substantial importance for the States. If accepted, it would make dramatic inroads into the States' authority to shape their own tort law. It also would preclude state courts from implementing what they regard as important public policies in an area of traditional state concern. *Amici* therefore submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, is a comprehensive statute "enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans.'" *Firestone Tire and Rubber Co. v. Bruch*, 109 S.Ct. 948, 955 (1989), quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). To accomplish this, the statute regulates both welfare benefit plans (those that offer health, disability, vacation, and similar benefits) and pension benefit plans. See 29 U.S.C. § 1003(a). Certain of these plans, however—those maintained by the federal, state, and local governments, specified church plans, plans maintained to comply with worker's compensation and similar laws, and some others—are not covered by ERISA. 29 U.S.C. § 1003(b).

Plans that are within the reach of the statute (so-called "ERISA plans") are subject to fiduciary, reporting, and disclosure requirements. See 29 U.S.C. §§ 1021-1031, 1101-1114. ERISA also imposes substantive requirements on pension benefit plans in the areas of funding, vesting, participation, and plan termination. 29 U.S.C. §§ 1052-1086, 1301-1461. See generally *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 374-375 (1980). In addition, Section 510 of ERISA, 29 U.S.C. § 1140, makes it unlawful for "any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary * * * for the purpose of interfering with the attainment of any right to which such participant may become entitled under [a benefit] plan."

[1] Both parties' letters of consent pursuant to Rule 37 of the Rules of this Court have been filed with the Clerk of the Court.

Section 502 of ERISA, 29 U.S.C. § 1132, contains the statute's enforcement provisions. In relevant part, Section 502(a)(1)(B) authorizes any plan participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Section 502(a)(3) also authorizes any plan participant, beneficiary, or fiduciary to seek "to enjoin any act or practice which violates the provisions of this subchapter or the terms of the plan," or to "obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." Section 502(e)(1) gives state courts concurrent jurisdiction with the federal district courts to entertain "actions under subsection (a)(1)(B)" of Section 502; the federal courts have exclusive jurisdiction to entertain other "civil actions under this subchapter brought by the Secretary [of Labor] or by a [plan] participant, beneficiary, or fiduciary."

Finally, and most importantly for present purposes, ERISA contains an express preemption provision. Section 514(a), 29 U.S.C. § 1144(a), provides that the federal statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of [title 29] and not exempt under section 1003(b) of [title 29]." These terms are defined by Section 514(c), which provides that the phrase "State law" includes all laws "of any State"; the term "State" in turn is defined as any

State or political subdivision "which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." In addition, Section 514(b) contains a number of exceptions to the preemption provision that are not at issue here.

2. This is a wrongful discharge action brought in Texas state court by respondent against petitioner, his former employer. Respondent's employment was terminated "after he had accumulated nine years and eight months of service" to petitioner (Pet. App. 2a); according to the court below, "the termination occurred exactly four months prior to the vesting of [respondent's] retirement and pension benefits, at which time [petitioner] would have been required to contribute to [respondent's] pension fund." *Ibid.* Although petitioner "ultimately allowed [respondent's] pension to vest" (*id.* at 2a n.2), respondent contended that petitioner had discharged him "to escape its obligation to contribute to his pension fund." *Id.* at 2a (footnote omitted). Respondent's suit was dismissed by the state trial court (*id.* at 25a-26a) and the state court of appeals (*id.* at 17a-24a) on state law grounds.

The Texas Supreme Court reversed. Pet. App. 1a-16a. While noting that Texas courts traditionally have permitted the termination of at-will employment without cause (*id.* at 3a), the court also recognized that both federal and state law have eroded this doctrine (*id.* at 3a-4a) and that "[n]umerous other states have accepted the principle that public policy can limit an employer's power to discharge at-will employees." *Id.* at 4a. Here, the court found that the Texas statutes establishing pension rights for public employees demonstrate "that the state has an interest in protecting employees' interests in pension plans." The court also noted that ERISA Section 510 precludes the discharge of an employee for the purpose of interfering with his pension rights, and added that "[t]he very passage of ERISA demonstrates the

great significance attached to income security for retirement purposes." *Id.* at 5a.

The court accordingly held that "public policy favors the protection of integrity in pension plans and requires in this case an exception to the employment-at-will doctrine. This exception allows recovery when the plaintiff proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund." Pet. App. 5a (footnote omitted). The court added that ERISA did not preempt respondent's action "because here the plaintiff acknowledged in his brief to the court of appeals that he is *not* seeking lost *pension benefits* but is instead seeking future wages, mental anguish and punitive damages as a result of the wrongful discharge." *Id.* at 5a n.3. The court accordingly remanded the case to the trial court. *Id.* at 5a.

Justice Cook, joined by two other Justices, dissented. Pet. App. 5a-13a. He maintained "that the law created today by this court relates to a pension plan and directly conflicts with the specific provisions of [ERISA] § 510 establishing a federal cause of action under ERISA. Consequently, that section preempts our new law through § 514(a)." Pet. App. 7a. Justice Cook added that, "because preemption of the claim at issue leaves a plaintiff with a cause of action that can be litigated only in federal court, ERISA preempts the forum as well as the cause of action." *Ibid.* Justice Cook also argued that petitioner was entitled to summary judgment and that the majority should have limited the damages available to respondent (*id.* at 9a-13a). Justice Gonzalez dissented separately (*id.* at 13a-16a), agreeing that respondent's action is preempted by ERISA (*id.* at 13a) and noting that the court left open the question whether respondent would be entitled to punitive damages should he be successful on the merits of his claim. *Id.* at 14a-15a.

SUMMARY OF ARGUMENT

1. The controlling question here is whether the Texas common law rule announced in this case "relate[s] to" an ERISA plan within the meaning of Section 514. In our view, the language of ERISA, which makes preemption turn on a state law's relationship to a plan, cannot encompass laws—like the one formulated by the court below—that apply to an employer rather than to a plan, that regulate the employer's relationship with an employee rather than with a plan, and that have no discernible impact whatever on a plan. In fact, it seems clear to us that ERISA's preemption clause reaches only those state laws that regulate the terms and conditions of ERISA plans, or that refer in terms to those plans.

This understanding of Section 514(a) is conclusively confirmed by an element of ERISA that petitioner ignores, but that should be crucial to the resolution of this case: the statutory definitions that control the interpretation of the preemption section. Section 514(c) defines the universe of potentially preempted enactments to include the laws "of any State," and in turn provides that the term "State" describes any governmental entity that "purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." This definition was written specifically to delimit the scope of the preemption clause; it was drafted at the same time and by the same Conference Committee that placed the "relate to" language in ERISA. Indeed, the portion of the definition of "State" quoted above would be wholly meaningless if it did not set the outer bounds of the preemption clause. By its plain terms, then, the language of ERISA makes preemption appropriate only if the state law, however indirectly, "regulate[s] the "terms and conditions of employee benefit plans." We note that the Court's decisions all have been consistent with this definition of Section 514(a).

The state law at issue here plainly escapes preemption under this test. It regulates the relationship between the

employer and its employee, rather than the ERISA plan. It has no effect whatever on the terms and conditions of the plan, the benefits offered by the plan, the methods by which the plan processes or pays claims, the funding of the plan, or other aspects of plan administration. And while some sort of pension system (although not necessarily an ERISA plan) presumably must be in place for the employee to have a cause of action, that hardly makes the law an attempt to regulate the terms and conditions of an ERISA plan.

2. Petitioner contends that Texas law must "relate to" a plan within the meaning of Section 514(a) because it bears some similarity to ERISA Section 510. But the test set out in Section 514(a) requires relation to a plan, not relation to some other provision of ERISA. Indeed, before adopting the current language of Section 514(a), Congress considered and rejected a preemption test that looked to the overlap between state and federal law—the very test that petitioner contends for now. Petitioner's related argument that the Texas law somehow makes reference to an ERISA plan is equally meritless. The Texas Supreme Court's decision sets out a rule that is directed at any attempt to prevent the vesting of any benefit, whether or not an ERISA plan is involved. Texas law therefore makes no express reference to ERISA, and does not "single[] out ERISA plans, by express reference, for special treatment." *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 838 n.12 (1988).

3. Our reading of Section 514(a) draws additional support from ERISA's legislative history and policies. Each of the principal sponsors described the provision as preempting the state regulation of plans; the examples they provided of laws that would be superseded all involved attempts to regulate plan terms or administration. The legislative history also makes quite clear, as the Court has noted, that the overriding purpose of Section 514(a) was to ensure that the administrative practices of multistate benefit plans would be governed by only a

single set of regulations. But the Texas law at issue here has absolutely no effect on plan administration or policies.

In arguing to the contrary, petitioner and its *amici* maintain that the availability of punitive damages in state court might discourage employers from creating or maintaining plans. But even if petitioner is correct in its assertions that punitive damages are unavailable under ERISA (a question this Court has left open) and that they *are* available under Texas law (a question the court below did not resolve), it remains the case that the state law at issue here does not in any sense regulate the terms and conditions of plans, or raise the threat of disuniformity. And any effect that the decision below might have on employer behavior surely is too tangential and speculative to warrant preemption; after all, this Court already has rejected the proposition that ERISA preempts every state tort or contract law that makes the operation of a plan more expensive.

ARGUMENT

ERISA DOES NOT PREEMPT THE STATE LAW AT ISSUE IN THIS CASE.

Petitioner's argument (Br. 19-21) is grounded largely on general assertions about the breadth and clarity of the ERISA preemption provisions. But these are painfully slender props on which to support petitioner's central contention. In fact, in the ERISA setting this Court repeatedly has "presume[d] that Congress did *not* intend to pre-empt areas of traditional state regulation." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) (emphasis added). See *Massachusetts v. Morash*, 109 S.Ct. 1668, 1675 (1989); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987). See generally, *e.g.*, *English v. General Electric Co.*, 110 S.Ct. 2270, 2278, 2280 (1990); *California v. ARC America Corp.*, 109 S.Ct. 1661, 1665 (1989). This case—which

involves an application of state tort law[2]—thus squarely presents a form of state regulation that presumptively is " 'preserved in our federalist system.' " *Morash*, 109 S.Ct. at 1675, quoting *Fort Halifax*, 482 U.S. at 19.

At the same time, the meaning of Section 514 is hardly crystalline. To the contrary, the Court repeatedly (and rather charitably) has noted that ERISA's preemption provisions "perhaps are not a model of legislative drafting." *Metropolitan Life*, 471 U.S. at 739. See *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 46 (1987); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523-524 (1981). But whatever the provision's outer boundaries, it is clear that Section 514 is not as broad as petitioner seems to suggest: state laws are not preempted simply because they deal generally with the subject of employee benefits (see, *e.g.*, *Fort Halifax*, 482 U.S. at 19; *Morash*, 109 S.Ct. at 1674-1675), and Section 514(a) does not even supersede all state laws that apply *directly* to ERISA plans. See *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 840-841 (1988).

Indeed, the most notable element of petitioner's analysis is its failure to offer a workable test to determine just when it is that a state law "relate[s] to any employee benefit plan" within the meaning of ERISA. And the omission is telling. In fact, a state law is preempted under that language only if it regulates the terms or conditions of ERISA plans, or otherwise is applied to affect the administration or operation of those plans. This test for the application of Section 514(a) follows directly from the statutory language and legislative history, and accords most fully with the policies that underlie ERISA.

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[2] Wrongful discharge suits are hardly novel; as petitioner's *amici* Chamber of Commerce *et al.* recognize, a substantial majority of States now recognize such suits in varying circumstances. See Br. 26-27.

A. A State Law "Relate[s] To" An ERISA Plan Only If It Regulates The Terms, Conditions, Or Administration Of A Plan.

1. As the Court repeatedly has indicated, "[a] law 'relates to' an employee-benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). See *Mackey*, 486 U.S. at 829; *Fort Halifax*, 482 U.S. at 7-8; *Pilot Life*, 481 U.S. at 47; *Metropolitan Life*, 471 U.S. at 739. This definition surely reaches laws that refer in terms to ERISA plans, or that regulate the terms and administration of those plans. But it is difficult to see how statutory language that requires a relationship to "any employee benefit plan" can encompass state laws—like the one at issue in this case—that apply to an employer rather than to a plan, that regulate the employer's relationship with an employee rather than with a plan, and that have no discernible impact whatever on an ERISA plan.[3]

This understanding of Section 514(a) is conclusively confirmed by an element of ERISA that petitioner wholly ignores, but that should be crucial to the resolution of this case: the express definitional provision that Congress placed in Section 514(c) to control the interpretation of "th[e] [preemption] section." 29 U.S.C. § 1144(c). This provision does not define the term "relate to." But it does define the universe of potentially preempted

[3] Of course, if a plaintiff prevailed in a suit such as this one he might be reinstated in his job and, as a consequence, again become a participant in his employer's plan. That is hardly certain, however; respondent himself seeks neither reinstatement nor plan benefits (see Pet. App. 5a n.3), and the Texas Supreme Court said nothing about the scope of available remedies for wrongful discharge. See generally Pet. App. 5a. But in any event, reinstatement generally is available as a remedy under analogous state anti-discrimination laws. That plaintiffs who successfully invoke those laws might become pension plan participants hardly is a basis for preemption under ERISA.

enactments to include the laws "of any State" (Section 514(c)(1)), and in turn provides that the term "State" describes any governmental entity that "purports *to regulate*, directly or indirectly, *the terms and conditions of employee benefit plans* covered by this subchapter." Section 514(c)(2) (emphasis added).

This definition was written specifically to control the interpretation of the "relate to" clause. As originally passed by the respective Chambers of Congress, neither the House nor the Senate versions of the bills that became ERISA contained a definitional section. See H.R. 2, 93d Cong., 2d Sess. § 699(a), reprinted at 3 Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974* 3599, 3820 (Comm. Print 1976) [hereinafter *Leg. Hist.*] (Senate version); H.R. 2, 93d Cong., 2d Sess. § 514, reprinted at 3 *Leg. Hist.* 3898, 4057-4059 (House version). Instead, that section was drafted by the Conference Committee along with the "relate to" language. See H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 83 (1974), reprinted at 3 *Leg. Hist.* 4277, 4357-4358. Its purpose therefore could only have been to delimit the scope of the preemption clause. Indeed, the portion of Section 514(c) quoted above would be wholly meaningless if it did not set the outer bounds of the statute's preemptive effect. And needless to say, Section 514(a) cannot be divorced from the provision that defines its terms; "the term 'State' either informs the meaning of 'relate to' or imposes independent requirements of its own." Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 Tex. L. Rev. 1313, 1325 (1984). In either event, the express language of ERISA makes preemption appropriate only if the state law, however indirectly (or even inadvertently), "regulate[s]" the "terms and conditions of employee benefit plans."

2. The Court's decisions all have been consistent with this understanding of Section 514(a). The Court has found that state laws "relate[d] to" ERISA plans when those laws affected benefit computation levels (see *Alessi*, 451 U.S. at 507-508, 524), mandated payment of particular benefits or modified the terms of a plan (see *Metropolitan Life*, 471 U.S. at 739; *Shaw*, 463 U.S. at 88-90), provided for "suit[s] by a beneficiary to recover benefits from a covered plan" (*Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 62-63 (1987); see *Pilot Life*, 481 U.S. at 43, 47-48), or otherwise "expressly refer[red] to—indeed, solely applied to—ERISA employee benefit plans." *Mackey*, 486 U.S. at 829. All of these, of course, are cases in which the state law effectively regulated the substance of plan benefit or payment policies.[4] On the other hand, state laws that did not affect the operation of plans have escaped preemption even when they regulated employee benefits. See *Fort Halifax*, 482 U.S. at 22-23. See also *Mackey*, 486 U.S. at 833-834. Indeed, this distinction explains why "run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts" (*Mackey*, 486 U.S. at 833) may be applied *directly* to plans; although such laws may have a very substantial effect on plans, they do not regulate plan terms, benefits, or administration—and therefore do not "relate to" plans.

It should be added that this is not a novel approach to preemption. The Court has held, for example, that Congress preempted the field of nuclear safety regulation, just as it has preempted the field of ERISA plan regulation. See, *e.g.*, *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 205 (1983). Just last Term, however, in a case that bears a remarkable similarity to this one, the Court unanimously rejected the contention that federal law preempted a state tort claim brought by an employee at a nuclear facility who asserted that she had been terminated for complaining about safety violations. The Court explained that

> not every state law that in some remote way may affect the nuclear safety decisions made by those who build and own nuclear facilities can be said to fall within the pre-empted field. We have no doubt, for instance, that the application of state minimum wage and child labor laws to employees at nuclear facilities would not be pre-empted, even though these laws could be said to affect tangentially some of the resource allocation decisions that might have a bearing on radiological safety.

English v. General Electric Co., 110 S. Ct. at 2278. "Instead," the Court added, "for a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *Ibid.*[5] Preemption in the nuclear

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[4] When—as in *Mackey*, which in part concerned special state garnishment rules that applied only to ERISA plans (see 486 U.S. at 828-829)—"a state law on its face imposes obligations on employee benefit plans, the law clearly 'relates to' the plan, because it invariably announces a purpose to regulate the manner in which plans operate within the law-creating state." Kilberg & Inman, *supra*, 62 Tex. L. Rev. at 1331 (footnote omitted).

[5] Petitioner's *amici* Chamber of Commerce *et al.* suggest that this case is distinguishable from *English* because ERISA, unlike the enactments at issue in *English*, contains an express preemption provision. Br. 8 n.10, 20 n.20. But the point of Section 514, as ERISA's principal sponsors made quite clear, was simply "to preempt the field for Federal regulations." 120 Cong. Rec. 29,933 (1974) (remarks of Sen. Williams), reprinted at 3 *Leg. Hist.* 4745. See *id.* at 29,197 (remarks of Rep. Dent) ("preemption of the field"), reprinted at 3 *Leg. Hist.* 4670; *id.* at 29,942 (remarks of Sen. Javits) ("the displacement of State action in the field of private employee benefit programs"), reprinted at 3 *Leg. Hist.* 4771. It should make no difference to the analysis that Congress preempted the field explicitly rather than by implication. As a result, *English*'s application of preemption of the field principles is relevant here.

field accordingly is appropriate only when the state law regulates some aspect of nuclear safety—just as preemption under ERISA is appropriate only when the state law regulates some aspect of plan benefits or administration.

The state law at issue here plainly escapes preemption under this test. It regulates the relationship between the employer and its employee, rather than the ERISA plan.[6] It has no effect whatever on the terms and conditions of the plan, the benefits offered by the plan, the methods by which the plan processes or pays claims, the funding of the plan, or other aspects of plan administration. Indeed, the Texas law's only arguable connection to petitioner's plan arises from the requirement that some sort of pension system (although not necessarily, as we explain below, an ERISA plan) presumably must be in place for the employee to have a cause of action. But that hardly makes the law an attempt to "regulate" the "terms and conditions" of a plan, or gives the law any effect on the operation of a plan. If this attenuated association may be said to affect the plan at all, it plainly does so "in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21.[7]

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[6] We do not suggest, of course, that state laws necessarily do not "relate to" plans simply because they are directed at employers. A law requiring that employers make specified contributions to a plan, for example—or, for that matter, requiring that employers create plans offering certain benefits—plainly would fall within the scope of the preemption clause. So would state laws mimicking many of the provisions of ERISA cited by petitioner (Br. 43) and its *amici* (Br. Chamber of Commerce *et al.* 21-23). But they would do so because they would regulate, albeit indirectly, the operation or administration of plans. The Texas law at issue here has no such effect.

[7] Petitioner is incorrect in asserting that "[federal and state] courts have *uniformly* found that state non-interference laws like that of the State of Texas 'relate to' ERISA-covered plans and are

3. Petitioner's principal attempt to demonstrate that the Texas law "relate[s] to" a plan turns on Section 510, which prohibits the discharge of a plan participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140. As we understand it, petitioner means to suggest that a state law "relate[s] to" a plan if the law resembles any substantive provision of ERISA. Br. 21-24. But Section 514(a) requires relation to a plan, not relation to some other provision of ERISA. And there is no reason to suppose that a state law "relate[s] to" a plan within the specific (and as we explain above, specifically defined) meaning of the preemption clause simply because that law parallels, in part, a different provision of ERISA that was enacted for dramatically differing purposes. To the contrary, as petitioner itself surely recognizes (see Br. 29-32), Congress considered and rejected a preemption test that looked to

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preempted." Br. 44 (emphasis in original). The Texas Supreme Court itself cited two federal decisions that recognized causes of action identical to the one in this case (Pet. App. 4a-5a); one of these decisions explicitly concluded that "New York law cannot be contrary to ERISA," *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822, 826 (E.D.N.Y. 1980), and the second relied on the analysis of *Savodnik*. *Hovey v. Lutheran Medical Center*, 516 F. Supp. 554, 558 (E.D.N.Y. 1981). See also *K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1372 (Nev. 1987) (recognizing action for dismissal to avoid payment of retirement benefits without discussing ERISA). In addition, it is not at all clear that one of the decisions relied upon by petitioner actually holds that actions such as this one are preempted. In *Conway v. Eastern Associated Coal Corp.*, 358 S.E.2d 423, 427 (W.Va. 1986) (footnote omitted), the court did indicate that "[t]his area is preempted by Federal ERISA law * * * * and such [wrongful discharge] is illegal under 29 U.S.C. § 1140." It appears, however, that the court believed ERISA *supported* the plaintiff's contention that his discharge violated public policy. The court accordingly went on to note that the action was not time-barred (see 358 S.E.2d at 427 n.1) but added that the plaintiff "presented no evidence whatsoever to support this allegation [of wrongful discharge]. * * * Therefore, we hold that the trial court correctly dismissed this cause of action." *Ibid.*

the overlap between state and federal law—the very test that petitioner contends for now.

Going into conference, the Senate bill that became ERISA would have preempted state laws "insofar as they may now or hereafter relate to the *subject matters regulated by this Act*." H.R. 2, § 699(a), 93d Cong., 2d Sess. (Mar. 4, 1974) (emphasis added), reprinted at 3 *Leg. Hist.* 3599, 3820. By replacing that language with the current statutory formula, Congress adopted a system that preempted "state laws relating to *plans* covered by ERISA as opposed to *subjects* covered by the Act." Kilberg & Heron, *The Preemption of State Law Under ERISA*, 1979 Duke L.J. 383, 390 (emphasis in original). Of course, in some important ways the change broadened ERISA's preemptive effect; that may be seen in several of the ERISA cases already decided by the Court.[8] But in other circumstances, as here, the change effectively narrowed the scope of preemption. "[T]he words actually chosen by Congress to effectuate its will" (*Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 372 (1986)) thus do not reach the Texas law challenged by petitioner, and that should be the end of the matter. See *Fort Halifax*, 482 U.S. at 9-12.

Petitioner also insists that Texas common law must be preempted because it makes "'reference to'" an ERISA plan. Br. 20, quoting *Shaw*, 463 U.S. at 97. This is simply incorrect. On its face, the Texas Supreme Court's decision sets out a rule that is directed at any attempt to prevent the vesting of any retirement benefit, whether

[8] *Shaw*, for example, involved state laws that mandated the payment of certain disability benefits and precluded plans from discriminating on the basis of pregnancy. See 463 U.S. at 88-90. These laws were preempted because they regulated—and therefore plainly "relate[d] to"—plans, even though ERISA itself "does not regulate the substantive content of welfare-benefit plans." *Metropolitan Life*, 471 U.S. at 732. See *Shaw*, 463 U.S. at 91.

or not an ERISA plan is involved. See Pet. App. 5a.[9] Yet as the Court explained in *Mackey*, a state law makes "reference to" a plan within the meaning of *Shaw* only when the law contains an "express reference to ERISA" (486 U.S. at 830); the Court noted "the disparate treatment accorded to non-ERISA benefit plans" by the state law at issue in *Mackey* (*id.* at 830 n.4), and held that "*any* state law which singles out ERISA plans, by express reference, for special treatment is pre-empted. * * * It is this 'singling out' that pre-empts the [state law at issue]." *Id.* at 838 n.12 (emphasis in original).

The state law here, however, does not single out ERISA plans. And it should no more be preempted because it involves the general area of retirement benefits than was the law in *Fort Halifax* preempted because it involved the general area of severance benefits. See *Fort Halifax*, 482 U.S. at 12. Indeed, the Texas law plainly is valid as applied to non-ERISA plans: under *Mackey* the law might be vulnerable to attack under ERISA if it in terms singled out employers who operated ERISA plans for especially favorable treatment by protecting them from suit.

Petitioner similarly complains (Br. 20 n.4) that a state court might look to a plan's provisions to determine whether evasion of pension obligations could have been the reason for dismissal of an employee. Under the Texas rule, however, state courts do not award plan benefits or otherwise apply the plan; as the Texas Supreme Court noted, the plan document is relevant only insofar as it may help "to explain the motivation behind [the employer's] initial termination of [the employee]." Pet. App. 2a-3a n.2. This use of the plan as evidence hardly justifies preemption: "interpretation alone does not con-

[9] Indeed, the court specifically pointed to state statutes that create pension plans for public employees who are not covered by ERISA. Pet. App. 5a.

stitute regulation of the terms and conditions of a plan." Kilberg & Inman, *supra*, 62 Tex. L. Rev. at 1330.

B. The Legislative History And Policies Of ERISA Cut Against Preemption.

1. Our understanding of Section 514(a) draws additional support from ERISA's legislative history and policy. The evolution of ERISA's preemption provisions has, perhaps unfortunately, become familiar. See *Metropolitan Life*, 471 U.S. at 745-746; *Shaw*, 463 U.S. at 98-99. As we explain above, for present purposes the most notable element in the development of the existing statutory language was the abandonment of a test that focused on areas covered by ERISA and the substitution of one that makes dispositive a state law's regulatory impact on plans. And the significance of this change is made clear by the floor debate, which offers the only useful discussion of Section 514(a)'s meaning.[10]

Each of ERISA's principal sponsors described Section 514 as setting aside "non-Federal *regulation of employee benefit plans*." 120 Cong. Rec. 29,197 (1974) (remarks of Rep. Dent) (emphasis added), reprinted at 3 *Leg. Hist.* 4670. See *id.* at 29,933 (remarks of Sen. Williams), reprinted at 3 *Leg. Hist.* 4745-4746; *id.* at 29,942 (remarks of Sen. Javits), reprinted at 3 *Leg. Hist.* 4770-4771. The examples offered during the debate of state laws that would be superseded—professional regulation of the contents of legal services programs (see *id.* at 29,949 (remarks of Sen. Javits), reprinted at 3 *Leg. Hist.* 4789; *id.* at 29,933 (remarks of Sen. Williams), reprinted at 3 *Leg. Hist.* 4746), compelled disclosure on the part of plans (see *id.* at 29,942 (remarks of Sen. Javits), reprinted at 3 *Leg. Hist.* 4771), imposition of fiduciary

[10] As we note above, the current language of Section 514(a) was written in conference. For its part, the Conference Report simply echoes the statutory language. See H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 383 (1974), reprinted at 3 *Leg. Hist.* 4277, 4650.

requirements on plans (see *ibid.* (remarks of Sen. Javits), reprinted at 3 *Leg. Hist.* 4771), and the like[11]—thus all involved attempts to regulate the administration of or benefits offered by plans. While this list is not exhaustive, it certainly is suggestive of the sorts of state laws that were thought to "relate to" ERISA plans.

Indeed, the one general indication of the manner in which Congress intended the preemption provisions to apply supports our reading. Representative Dent, floor manager for the bill in the House, explained that ERISA's preemption provisions "followed to a large extent the same approach as in Public Law 93-222 * * * where the regulation of health maintenance organizations [HMOs] was foreclosed to state authority—section 113(a) [sic]."[12] 120 Cong. Rec. 29,197 (1974), reprinted at 3 *Leg. Hist.* 4670. The statute to which Representative Dent referred preempted state laws relating to the creation and organization of HMOs—just as Section 514 of ERISA preempts laws that regulate the terms and conditions of plans. But nothing in that statute reached peripheral state rules of the sort at issue here.[13]

[11] Senator Javits offered the fullest description of Section 514's impact, stating that, "[i]n view of Federal preemption, State laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans—unless a criminal statute of general application—establishing state termination insurance programs, et cetera, will be superseded." 120 Cong. Rec. 29,942 (1974), reprinted at 3 *Leg. Hist.* 4771.

[12] Congressman Dent in fact had in mind Section 1311(a).

[13] The statute thus preempted laws requiring medical society approval for the creation of HMOs, requiring that physicians constitute a defined percentage of an HMO's governing body, requiring that all or a percentage of physicians in the locale be permitted to participate in providing services for the HMO, or requiring that HMOs meet specified capitalization or other financial requirements. 87 Stat. 931.

2. The legislative history also makes clear why Congress made preemption turn on a finding that state law regulates plan terms or administration: the fundamental purpose of the preemption provision was elimination of "the threat of conflicting or inconsistent State and local regulation of employee benefit plans." 120 Cong. Rec. 29,933 (1974) (remarks of Sen. Williams), reprinted at 3 *Leg. Hist.* 4745-4746. See *id.* at 29,197 (remarks of Rep. Dent) ("eliminating the threat of conflicting and inconsistent State and local regulation"), reprinted at 3 *Leg. Hist.* 4670. Congress thus intended to sweep aside "multiple and potentially conflicting State laws" so as to ensure "unformity with respect to interstate plans." *Id.* at 29,942 (remarks of Sen. Javits), reprinted at 3 *Leg. Hist.* 4770-4771.

The Court accordingly has recognized that "[t]he focus of the statute thus is on the administrative integrity of benefit plans." *Fort Halifax*, 482 U.S. at 15. In its most comprehensive analysis of the preemption provision's purposes, the Court explained that the legislative history

> reflect[s] recognition of the administrative reality of employee benefit plans. An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States. A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others.

Fort Halifax, 482 U.S. at 9. The Court therefore found it "clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. * * * Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations." *Id.* at 11.[14]

Although petitioner (Br. 36-41) and its *amici* (Br. Chamber of Commerce *et al.* 26-28) struggle gamely to demonstrate that Texas law will have an adverse effect on plans, they do not—and plainly could not—suggest that "state law create[s] the prospect that an employer's administrative scheme would be subject to conflicting requirements" (*Fort Halifax*, 482 U.S. at 10); "[t]he Company makes no contention that its [state] statutory duty has in any way hindered its ability to operate its retirement plans in uniform fashion." *Id.* at 14. And that should dispose of petitioner's case, for Texas law accordingly "present[s] none of the risks that ERISA is intended to address." *Morash*, 109 S.Ct. at 1673.

It should be added that, even on their own terms, the assertions of petitioner and its *amici* about the adverse impact of the Texas law are substantially overstated. Petitioner seems especially concerned about the possi-

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[14] This understanding explains why ERISA preempts state laws that regulate plans even when those laws are consistent with the federal statute's underlying purpose. See *Metropolitan Life*, 471 U.S. at 739; *Mackey*, 486 U.S. at 829. Laws that exceed ERISA's minima would subject multistate plans to varying requirements in different States. It should be noted, however, that the prospect of increased administrative or litigation costs cannot justify preemption where it is not required by the plain terms of Section 514(a). See *Mackey*, 486 U.S. at 831-832; compare *id.* at 843-844 (Kennedy, J., dissenting). Cf. *Firestone*, 109 S.Ct. at 956.

bility of punitive damages awards against employers. Asserting that such damages are unavailable in actions brought under Section 502(a)(3) to enforce Section 510 of ERISA, petitioner (Br. 39) and its *amici* (Br. Chamber of Commerce *et al.* 26-27) complain that the prospect of punitive damages liability in state tort actions will discourage employers from creating plans. We note that this complaint is premature; the Texas Supreme Court held only that respondent had asserted a proper cause of action, and left open the scope of the remedies available to respondent if he ultimately prevails on the merits of his claim. See Pet. App. 5a.[15] Moreover, the premise of petitioner's argument—that punitive damages are unavailable in federal court—may well be mistaken: this Court has left open the question whether such damages may be awarded under Section 502(a)(3), see *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 139 n.5, 144 n.12 (1985), and there are compelling reasons to believe that punitive damages should be available under the provision.[16]

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[15] Justice Gonzalez noted in dissent that "[t]he court * * * does not resolve whether the plaintiff is entitled to all damages pleaded," adding that "[t]his is essentially an open question." Pet. App. 14a. Justice Gonzalez also explained that, in Texas, "[a]s a general rule, the damages available for common law wrongful termination are contractual in nature." *Id.* at 15a.

[16] Both Congress and the Court have made it clear that "courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" *Firestone*, 109 S.Ct. at 954, quoting *Pilot Life*, 481 U.S. at 56. See also, *e.g.*, *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983); 120 Cong. Rec. 29,942 (1974) (remarks of Sen. Javits), reprinted at 3 *Leg. Hist.* 4770-4771. In doing so, "'state law where compatible with national policy may be resorted to and adopted as a national rule of decision. . . . Here, of course, there is little federal law to which the court may turn for guidance. State regulation of insurance, pensions, and other such programs, however, provides a pre-existing source of experience and experiment in an area in which there is, as yet, only federal inexperience. * * * [S]tate statutory sources of law will no doubt play a major role in the development of a federal common law under ERISA.'" *Massachusetts Mutual*, 473 U.S. at 157-158 n.18 (Brennan, J., concurring in the judgment) (citation omitted). Cf. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); *United States v. Yazell*, 382 U.S. 341, 356-357 (1966). And as petitioner's *amici* recognize (see Br. Chamber of Commerce *et al.* 26-27), this background of state tort law—to which federal courts should refer in defining the scope of the action for violation of ERISA Section 510—typically makes punitive damages available in circumstances such as those in this case.

In any event, even if punitive damages are available in state but not in federal court, it hardly seems likely that the prospect of additional liability for wrongful discharges that *already* are illegal and actionable under federal law will have much of an impact on the formulation and maintenance of plans. Whatever effect Texas law has by "attach[ing] additional consequenecs to retaliatory conduct by employers" surely "is neither direct nor substantial enough to place petitioner's claim in the preempted field." *English*, 110 S. Ct. at 2278. After all, as this Court already has made clear, it cannot be the case that a state law—such as a run-of-the-mill state tort or contract law—is preempted simply because it makes it more expensive for employers to operate plans. See *Mackey*, 486 U.S. at 831-832. The same plainly is true of petitioner's complaint (Br. 37) that, apart from questions of remedy, varying procedural devices will be applied in state wrongful discharge actions; the suggestion that employers will terminate plans to avoid state jury trials in cases that already may be remedied in federal court is simply incredible.[17] And most important, in neither case

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[17] Petitioner also argues (Br. 37-38) that the scope of the action defined by the Texas Supreme Court permitting recovery "when the plaintiff proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits" (Pet. App. 5a)—differs from the substantive scope of Section 510. We find it hard to believe that petitioner seriously advances this contention; if it does, its lengthy exegesis of Section 510 (see Br. 23-24, 26-36), which is premised on "the obvious comparability between ERISA Section 510 and the Texas law" (Br.

does the state cause of action in any sense regulate the terms and conditions of ERISA plans.

Of course, a state law that does not "relate to" a plan might nonetheless be preempted if it actually conflicts with a substantive provision of ERISA. Cf. *Fort Halifax*, 482 U.S. at 19. But that plainly is not the case here: as the Court noted in a related setting, "[p]aying both federal fines and state-imposed punitive damages * * * would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984). That understanding is true of ERISA as well, a statute that was, after all, "enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans.'" *Firestone*, 109 S.Ct. at 955, quoting *Shaw*, 463 U.S. at 90.

C. ERISA's Enforcement Provision Does Not Preempt Texas Common Law.

Finally, petitioner (Br. 25-26) and its *amici* (Br. Chamber of Commerce *et al.* 16-17) seem to suggest that ERISA's enforcement provision, Section 510, may of its

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24 n.7), would be irrelevant. Indeed, the question presented by petitioner is whether ERISA preempts state laws that permit an employee to challenge a discharge designed to "interfere with his attainment of benefits under an ERISA-covered pension benefit plan." Br. i. And the Texas Supreme Court's language does not, in fact, seem notably different from that used by federal courts in describing the cause of action under Section 510. See, *e.g.*, *Ursic v. Bethlehem Mines*, 556 F. Supp. 571, 574 (W.D. Pa.) (condemning "strategy of reducing pension payments from the corporate treasury"), aff'd in relevant part, 719 F.2d 670, 672 (3d Cir. 1983). In any event, if Texas law does not "relate to" a plan it need not precisely parallel federal law to escape preemption. Cf. *English*, 110 S. Ct. at 2278. Of course, if state law actually conflicts with a provision of ERISA (see Pet. Br. 38), or prohibits conduct that is permitted by ERISA, it will be preempted for that reason. See generally *Fort Halifax*, 482 U.S. at 19; *Alessi*, 451 U.S. at 524-525.

own force preempt Texas common law. This contention is without merit. Where an enforcement provision appears in the same statutory subchapter as an express preemption provision, the latter provision surely defines the scope of preemption.[18] In any event, "[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." *ARC America Corp.*, 109 S.Ct. at 1667. See, *e.g.*, *English*, 110 S.Ct. at 2280.[19] Indeed, "[o]rdinarily, the mere existence of a federal regulatory or enforcement scheme, even one [that is] detailed * * * does not by itself imply pre-emption of state remedies." *Id.* at 2279.

In *English*, the Court accordingly rejected the contention—identical to the one made by petitioner here—that the omission of a punitive damages remedy from a comprehensive federal remedial scheme (which provided for reinstatement, back pay, compensatory damages, and attorney's fees) should be understood to preempt a state cause of action for punitive damages. *Id.* at 2273 n.2, 2279-2280 (interpreting Section 210 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851(a). There is no reason for a different outcome under ERISA.

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[18] Petitioner (Br. 34, 36) and *amici* Chamber of Commerce *et al.* (Br. 13-14) seize upon Senator Williams' statement that "the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulation." 120 Cong. Rec. 29,933 (1974), reprinted at 3 *Leg. Hist.* 4745-4746. But the substantive and enforcement provisions have this effect through operation of Section 514(a); otherwise, the preemption clause would be meaningless. Again, then, the crucial question here is the scope of the "relate to" clause.

[19] That is true even when the federal courts have exclusive jurisdiction to entertain claims under the federal cause of action, as is the case, to give just one example, in actions under the Sherman and Clayton Acts, the provisions of federal law that were asserted to have preemptive force in *ARC America*. See 15 U.S.C. §§ 4, 15(a).

It should be added that the reliance of petitioner (Br. 25) and its *amici* (Br. Chamber of Commerce *et al.* 14-15) on *Pilot Life* is misplaced.[20] The Court did not there suggest that ERISA's enforcement provisions themselves have preemptive force; it was conceded that the state law at issue "relate[d] to" an ERISA plan, and the question before the Court was whether a state-law action challenging the plan's payment methods "fall under an exception to § 514(a)," the so-called saving clause.[21] *Pilot Life*, 481 U.S. at 47-48. And while the Court did look to the enforcement provisions to help inform its understanding of the saving clause (see *id.* at 52), the Court found it dispositive that the case involved the claims settlement process, explaining that the enforcement provisions reflect a "balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Id.* at 54. This is wholly consistent with our understanding that the preemption of actions challenging plan payment terms was a central purpose of the preemption clause.

Indeed, the decision in *Pilot Life* primarily turned on the nature of the claim as one seeking benefits from a plan. The Court's holding substantially relied on Con-

[20] *Amici* Chamber of Commerce *et al.* also rely (Br. 19-20) on *Wisconsin Dep't of Industry v. Gould Inc.*, 475 U.S. 282 (1986), and other cases involving the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, to support their argument that the state courts are ousted of jurisdiction here. But those decisions are inapposite; they turned on the primary jurisdiction of the National Labor Relations Board under that statute and the importance "to the administration of the Act that these determinations be left in the first instance to the [NLRB]." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-245 (1959). See *id.* at 242; *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971); *Garner v. Teamsters Union*, 346 U.S. 485, 490-491 (1953).

[21] This clause, Section 514(b)(2)(A), saves from preemption under Section 514(a) "any law of any State which regulates insurance, banking, or securities." See generally *Metropolitan Life*, 471 U.S. at 739-747.

gress's decision to model the Section 502(a) cause of action against plans and their fiduciaries on Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The Court noted that,

> "[U]nder the conference agreement, civil actions may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility. . . . [W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. *All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.*"

Pilot Life, 481 U.S. at 55, quoting H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974) (emphasis added by the Court). Plainly, the *"all such actions"* are those brought to recover plan benefits. The Court thus explained that "Congress' specific reference to § 301 of the LMRA to describe the civil enforcement scheme of ERISA makes clear its intention that all such suits *brought by beneficiaries or participants asserting improper processing of claims* under ERISA-regulated plans be treated as federal questions governed by § 502(a)." *Pilot Life*, 481 U.S. at 56 (emphasis added). Respondent's suit, in contrast, which was not brought against a plan, and does not relate either to benefits[22] or to the other terms and conditions of a plan, is not affected by the *Pilot Life* analysis.

[22] Although petitioner notes (Br. 42) that respondent at one point sought relief for loss of various benefits, that is not part of the cause of action approved by the Texas Supreme Court. The court noted that petitioner had allowed respondent's pension to vest, and explained that "the pension plan issue is relevant in order to explain the motivation behind [petitioner's] initial termination of

CONCLUSION

The judgment of the Texas Supreme Court should be affirmed.

Respectfully submitted,

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July 18, 1990

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respondent." Pet. App. 3a n.2. Indeed, the Texas Supreme Court held that petitioner's action is not preempted precisely because "the plaintiff acknowledged in his brief to the court of appeals that he is *not* seeking lost *pension benefits* but is instead seeking future wages, mental anguish and punitive damages as a result of the wrongful discharge." *Id.* at 5a n.3 (emphasis in original).

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In The
Supreme Court Of The United States

OCTOBER TERM, 1990

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY McCLENDON,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TEXAS

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE*

The National Employment Lawyers Association (hereafter NELA) is a non-profit organization consisting of over 800 lawyers in forty-nine states. NELA's members concentrate in the representation of individual employees in employment and labor matters. Members of NELA are active in litigating abusive employee discharge claims like that of Respondent throughout the nation. NELA is vitally interested in the outcome of this critical case.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of civil liberties and civil rights. Based on those principles, the ACLU has encouraged the development of both substantive and procedural limitations on the common law doctrine of employment-at-will. The decision below furthers the development of such limitations and therefore raises issues of organizational concern to the ACLU.

STATEMENT OF THE CASE

NELA and ACLU adopt the statement of the case as presented by Respondent.

ISSUE

Whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, preempts a state common law claim that an employer has unlawfully discharged an employee in order to avoid contributing to or paying benefits under the employee's pension fund.

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*Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

Absent a clear and unmistakable Congressional intent to preempt state law, a federal statute may not eviscerate state remedies for wrongful termination of the employment relationship. While Congress intended the scope of ERISA's express preemption provision to be broad, that scope is not unlimited. Rather, ERISA preempts only those state laws that both relate to employee benefit plans *and* purport to regulate, directly or indirectly, the terms and conditions of those plans. Congress intended that preemption would ensure that the administrative practices of a benefit plan will be governed by only a single set of regulations, and preemption is appropriate only when that intent is served. Because the Texas law does not purport to regulate Petitioner's pension plan, nor does it subject the plan to a different set of administrative practices, it is not preempted.

ARGUMENT

I. Absent A Clear And Unmistakable Congressional Intent To Preempt State Law, A Federal Statute May Not Eviscerate State Remedies For Wrongful Termination Of The Employment Relationship.

Preemption analysis begins with the settled concept that all presumptions operate against preemption, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), which rests on "the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). As Chief Justice Rehnquist has explained, "unless the requisite preemption intent is abundantly clear, we should hesitate to invalidate state and local legislation . . . ." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 643 (1973) (Rehnquist, J. dissenting). This hesitancy to displace state law is "guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987); *Massachusetts v. Morash*, __ U.S. __, 109 S.Ct. 1668, 1675 (1989).

This Court has long preserved states' rights to enforce common law remedies, especially in the labor context. *See, e.g., Belknap v. Hale*, 463 U.S. 491, 509 (1983) (state fraud and contract claims not preempted by the National Labor Relations Act); *Linn v. Plant Guard Workers*, 383 U.S. 53, 63 (1966) ("state remedies have been designed to compensate the victim . . ."). As this Court emphasized in *Fort Halifax Packing Co., supra*, 482 U.S. at 21, "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State."

Indeed, " 'where . . . the field which Congress is said to have preempted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be *'clear and manifest.'* " *English v.*

General Electric Company, __ U.S. __, 58 U.S.L.W. 4679, 4681 (1990) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)) (emphasis added). "Preemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has *unmistakably* so ordained.' " *Alessi v. Raybestos-Manhattan, Inc., supra*, 451 U.S. at 422 (citations omitted) (emphasis added). This Court therefore requires that the party urging preemption meet a very high burden of proof indeed.

Following this principle, this Court has held that state law is preempted when one of three tests is satisfied.

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-98 (1983). Preemption fundamentally is a question of congressional intent . . ., and when Congress has made its intent known through explicit statutory language, the court's task is an easy one.
>
> Second, *in the absence of explicit statutory language*, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.
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> * * *
>
> Finally, state law is preempted to the extent that it actually conflicts with federal law.

English v. General Electric Company, supra, at 4681 (citations omitted) (emphasis added).

II. The Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, Preempts Only Those State Laws That Both Relate To Employee Benefit Plans And Purport To Regulate, Directly Or Indirectly, The Terms And Conditions Of Those Plans.

Section 514 of ERISA, 29 U.S.C. § 1144, contains the explicit statutory language that allows the Court to proceed with an analysis under the first test in *English* and to dispense with an analysis under the "field" theory of the second test. *Id.* (citing *Shaw v. Delta Airlines, Inc., supra*). Section 514 provides in pertinent part:

> (a) Supersedure; effective date
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .
>
> (c) Definitions
>
> For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.
>
> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Section 514 has been described as a "virtually unique preemption provision." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). Under it, a "State law" is preempted if it " 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Airlines, Inc., supra*, 463 U.S. at 96-97. This broad language, however, is limited in several ways. First, it is limited by the exceptions contained in Section 514(b). *See, e.g., Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985). In addition, "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Airlines, Inc., supra*, 463 U.S. at 100 n.21.

Finally, the otherwise broad scope of this express preemption clause is further narrowed by Section 514(c), which defines "State law" as the "laws . . . of any State," and which defines a "State" to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, *which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans.*" (emphasis added). Therefore, in order for a law to be a "State law" within the scope of Section 514(a), the law must "purport to regulate" ERISA plans.[1] At its broadest then, ERISA preempts only those laws that both "relate to" *and* "purport to regulate" ERISA plans. *See Stone & Webster Engineering Corporation v. Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982), *aff'd sum. sub nom. Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981); *Rebaldo v. Cuomo*, 749 F.2d 133, 137 and n.1 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985); *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1359 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986); *Teper v. Park West Galleries, Inc.*, 427 N.W.2d 535, 545 (Mich. 1988) (Riley, C.J., concurring).

[1] Just as the Court in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8 (1987), refused to read the word "plan" out of the statute, so should the statute's definitions of "State" and "State law" be given their intended life, particularly since they are included within the very section containing the express preemption clause.

In addition to the statute's plain language, the extensive legislative history cited by Petitioner (Pet. Brief 32-35) fully supports this two-prong test and the conclusion that Section 514 was intended to prohibit state *regulation* of benefit *plans*. For example, Representative Dent spoke of "the reservation to Federal authority [of] the sole power to *regulate* the field of employee benefit *plans* [and the need to apply] this principle in its broadest sense to foreclose any non-Federal *regulation* of employee benefit plans." 120 Cong. Rec. 29197 (1974), *reprinted in 3 Legislative History of the Employee Retirement Income Security Act of 1974 ("Legislative History")* (Comm. Print 1976) at 4670-4671 (emphasis added). Senator Williams, in addressing the need for the preemption clause, spoke of "eliminating the threat of conflicting or inconsistent State and local *regulation* of employee benefit *plans*." *Id.* at 4746 (emphasis added). And Senator Javits concluded his remarks by commenting:

> Although the desirability of further *regulation* — at either the State or Federal level — undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and *the interests of uniformity with respect to interstate plans required* — but for certain exceptions — *the displacement of State action in the field of private employee benefit programs.*

Id. at 4770-4771 (emphasis added).

This Court, in analyzing whether ERISA preempts a state law, has repeatedly stated that "as in any preemption analysis, 'the purpose of Congress is the ultimate touchstone.' " *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8 (1987) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 474 (1985)). In *Fort Halifax*, the Court, relying in substantial part on the legislative history cited above, examined this purpose and stated:

> It is thus clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex *administrative activities.* A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. *Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.*

Id. at 11 (citation omitted) (emphasis added). Therefore, the Court concluded that preemption of a state law must further the purpose of ERISA preemption. *Id.* at 15.

Although *Ft. Halifax* and other prior opinions of this Court have not expressly incorporated the "purports to regulate" language of Section 514(c) within their reading of Section 514(a), the conclusion that the "purports to regulate" language establishes the outer bounds of ERISA preemption flows from and is consistent with these decisions. In *Alessi, supra,* the Court struck down a state law that would have affected the amount of benefits provided in ERISA-covered plans and the manner in which those benefits were calculated. State regulation of this type strikes at the heart of plan administration. Similarly, in *Shaw, supra,* the state law preempted also involved an attempt to mandate what benefits would be included in ERISA-covered plans.

In both *Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58 (1987), and *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41 (1987), each plaintiff brought common law causes of action alleging improper processing of a claim for benefits under an employee benefit plan.[2] Because the state laws involved efforts to have state courts assume the ultimate responsibility for claims processing, they were clearly impermissible attempts to regulate the administration of ERISA-covered plans and were properly preempted.[3] And in *Mackey v. Lanier Collection Agency & Service, Inc.,* 486 U.S. 825 (1988), the garnishment law struck down was one that expressly purported to regulate an ERISA plan, while the garnishment law of general application survived the preemption analysis, even though its application plainly had a "connection to" ERISA plans.

The language of the statute, its legislative history, and the prior decisions of this Court all support the conclusion that Congress intended ERISA to displace only those laws that relate to *and* purport to regulate benefit plans. This conclusion gives full effect to the Congressional intent to foster the uniform regulation of benefit plans by preventing state interference in the management and administration of those plans.

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[2] The Court in *Taylor* did not address the question of ERISA preemption of the claims against the employer, since removal jurisdiction was not based upon those claims. *See Taylor v. General Motors Corp.,* 826 F.2d 452 (6th Cir. 1987) (addressing pendent claims on remand). Therefore, the Court's statement in *Taylor* that "Taylor's common law contract and tort claims are preempted by ERISA," *id.* at 62, perhaps inadvertently sweeps too broadly.

[3] Both *Taylor, supra* at 66, and *Dedeaux, supra* at 52–55, also arguably suggest in *dicta* that any state law claim that could be recharacterized as falling within the scope of § 502(a) is preempted. In these cases, however, the common law claims preempted fell within the scope of § 502(a)(1)(B). Therefore, only consideration of the preemptive force of § 502(a)(1)(B) was necessary to the decision of those cases, as any claim within the scope of that subsection necessarily "purports to regulate" an ERISA plan. In fact, the legislative history on which both *Taylor* and *Dedeaux* relied to find a clear manifestation of preemptive intent applies only to claims within the scope of § 502(a)(1)(B). *Taylor* at 65–66; *Dedeaux* at 55 (citing H.R. Conf. Rep. No. 93-1280, p. 327 (1974)). Any broadening of this line of analysis to causes of action other than those within the scope of § 502(a)(1)(B) should take place only if it is consistent with the "purports to regulate" language of § 514(c) and otherwise furthers the purpose of ERISA preemption as described in *Ft. Halifax, supra.* Because Respondent's claim does not fall within the scope of § 502(a)(1)(B), the clear and manifest legislative intent necessary to support a finding of preemption does not exist.

III. ERISA Does Not Preempt A State Common Law That Prohibits An Employer From Discharging An Employee In Order To Avoid Contributing To Or Paying Benefits Under The Employee's Pension Fund.

Applying this standard to the Texas law under attack by Petitioner, it becomes clear that because the law does not purport to regulate an ERISA Plan, it is not a "State law" preempted by Section 514. Far from regulating any terms and conditions of Petitioner's pension fund, the law attempts instead to regulate the employer-employee relationship, an area "within the traditional police power of the State." *Ft. Halifax Packing Co., supra,* 482 U.S. at 21. Under the Texas law, a terminated employee will be allowed recovery when he proves that "the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund." *McLendon v. Ingersoll-Rand Co.,* 779 S.W.2d 69, 71 (Tex. 1989). The focus of the employee's claim, therefore, will be the employer's intent in severing the employment relationship. An inquiry into this intent can hardly be said to regulate, either directly or indirectly, the terms and conditions of an ERISA plan.[4] *See, e.g., K Mart Corp. v. Ponsock,* 732 P.2d 1364 (Nev. 1987) (award of extracontractual damages for bad faith discharge of employee to avoid payment of retirement benefits).

The decision to terminate an employee does not implicate any fiduciary duties under ERISA. *Cf., Amato v. Western Union International, Inc.,* 773 F.2d 1402, 1416 (2d Cir. 1985), *cert. dismissed,* 474 U.S. 1113 (1986) ("ERISA permits employers to wear 'two hats,' and [ ] they assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrators . . ."); *see also, Dzinglski v. Weirton Steel Corp.,* 875 F.2d 1075, 1078-9 (4th Cir.), *cert. denied,* 110 S.Ct. 281 (1989); *Hlinka v. Bethlehem Steel Corp.,* 863 F.2d 279, 285 (3d Cir. 1988). Since Section 3(21)(A), 29 U.S.C. Section 1002 (21)(A), defines a fiduciary in part as one who has any discretionary authority or control regarding the management or administration of a benefit plan, the termination of an employee, and an inquiry into the reasons for the termination, do not and will not affect the management or administration of the plan.

Nor, as Petitioner concedes (Pet. Brief at 46 n.12), will the calculation of Respondent's damages, including his lost benefits, if any, interfere in the regulation of the plan. Because the loss of benefits from any wrongful termination, regardless of motive, is nothing more than a consequence of the termination and does not therefore "relate to" the underlying plan, the fact that lost benefits are included as an element of damages to make the employee whole does not trigger preemption. *See, Teper v. Park West Galleries, Inc.,* 427 N.W. 2d 535 (Mich. 1988); *Martori Bros. Distributors v. James-Massengale,* 781 F.2d 1349, 1358 (1986) (cited with approval in *Fort Halifax, supra,* 482 U.S. at 12 n.6); *Morningstar v. Meijer, Inc.,* 662 F.Supp. 555 (E.D. Mich. 1987); *Totton v. New York Life Insurance Co.,* 685 F.Supp. 27 (D. Conn. 1988); *cf., Lingle v. Norge Division of Magic Chef, Inc., supra,* 486 U.S. at 413 n.12. To hold otherwise would preempt every wrongful termination action, regardless of the underlying public policy supporting it, in which the employee claimed lost benefits as an element of damages. There is simply no evidence of a Congressional intent, let alone clear, manifest, and unmistak-

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[4] While Petitioner's pension plan may contain information, such as a vesting schedule, that may provide circumstantial evidence of the employer's intent, this fact alone does not involve the regulation, direct or indirect, of the plan, and would be insufficient to trigger preemption. *Cf. Lingle v. Norge Division of Magic Chef, Inc.,* 486 U.S. 399, 413 n.12 (1988) ("although federal law would govern the interpretation of [a collective bargaining] agreement to determine the proper damages, the underlying state-law claim, not otherwise pre-empted, would stand."). Moreover, that Petitioner may have ultimately allowed Respondent's pension to vest only underscores the fact that his cause of action does not purport to regulate the terms and conditions of the plan.

able evidence, to support such a sweeping application of the preemption clause.[5]

Finally, in the highly speculative event that the Texas law might, by the circuitous process envisioned by Petitioner (Pet. Brief at 36-41), affect Petitioner's plan, these effects are no less tenuous, remote, and peripheral than those rejected by the Court in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988). There, the majority was apparently unpersuaded by the dissent's claim that "[c]ompliance with the state garnishment procedures subjects the plan to significant administrative burdens and costs." *Id.* at 842. It is particularly significant that the majority reached its conclusion without quarreling with the dissent's claim that:

> Petitioners are required to confirm the identify of each of the 23 plan participants who owe money to respondent, calculate the participant's maximum entitlement from the fund for the period between the service date and the reply date of the summons of garnishment, determine the amount that each participant owes to respondent, and make payments into state court of the lesser of the amount owed to respondent and the participant's entitlement. Petitioners must also make decisions concerning the validity and priority of garnishments and, if necessary, bear the costs of litigating these issues. Further, as trustees of a multiemployer plan covering participants in several States, petitioners are potentially subject to multiple garnishment orders under varying or conflicting state laws. It is apparent that these effects of garnishment laws on employee benefit plans are not tenuous, remote, or peripheral, and that such laws are accordingly pre-empted.

[5] To the extent that Respondent sought lost benefits in a lump sum from his employer as an element of damages, Amici disagree with footnote 3 of the Texas Supreme Court's opinion. That an employee has sought lost benefits in a lump sum as an element of damages should have no bearing on the preemption analysis for the reasons stated above.

Id. If anything, the burdens and costs hypothesized by Petitioner are less severe than those feared by the dissent in *Mackey*. Moreover, Petitioner's speculation is no substitute for the clear, manifest, and unmistakable showing required to meet its burden of proof. Accordingly, preemption would in no way address the concerns of ERISA's preemption provisions, and ERISA does not preempt Respondent's state law claim.

IV. That The Facts Of This Case May Have Also Provided Respondent With A Cause Of Action Under Section 510 Of ERISA Is Insufficient To Support A Finding Of Preemption.

Section 510 of ERISA, 29 U.S.C. § 1140, makes it unlawful "for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ." Section 502(e)(1), 29 U.S.C. § 1132(e)(1), gives the federal courts exclusive jurisdiction over Section 510 claims.

Respondent may very well have been able to state a claim under Section 510. Nonetheless, this possibility provides no basis for the conclusion that his state law claim is preempted by ERISA. Any conclusion that Sections 510 and 502(e) together preempt the Texas law would have to rest on an analysis that Congress has not only expressly preempted the field of pension plan regulation, but that it has also implicitly preempted a field of wrongful termination law. This analysis, however, is precluded by Section 514's express preemption provision. *See, English v. General Electric Company*, __ U.S. __, 58 U.S.L.W. 4679, 4681 (1990) ("*in the absence of explicit statutory language*, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.") (emphasis added); *California v. ARC America Corp.*, 109 S.Ct. 1661, 1665 (1989).

Moreover, ERISA has been described as "a 'comprehensive and reticulated statute,' which Congress adopted after careful study of private retirement pension plans." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980)). Because the express language of Section 514 cannot be read to preempt Texas law, in "a comprehensive regulatory scheme like ERISA, such omissions are significant ones." *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988). *Cf. Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 147 (1985).

Finally, no conflict exists between the Texas law and Section 510. "[O]rdinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law." *English v. General Electric Co., supra*, 58 U.S.L.W. at 4684 (quoting *California v. ARC America Corp.*, 109 S.Ct. 1661, 1667 (1989)). While "every subject that merits congressional legislation is, by definition, a subject of national concern . . . [, this] cannot mean, however, that every federal statute ousts all related state law . . . ." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985). In *Decanas v. Bica*, 424 U.S. 351, 356 (1976), this Court recognized that "states possess broad authority . . . to regulate the employment relationship to protect workers within the State." Preempting the Texas law, where Congress has declined to provide for it within an express preemption clause, would frustrate this principle and needlessly impair the state's ability to protect the employer-employee relationship.

CONCLUSION

Wherefore, Amici respectfully urge this Court to affirm the judgment below.

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